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EDITORS NOTE

"Knowledge has to be improved, challenged, and increased constantly, or it vanishes."- Peter F. Drucker.

It is with the guidance of Drucker in mind that I am pleased to present the second edition of volume two of the UNILAG Law Review. Like I stated in the first edition of this volume, every publication is a testament to the fact that the UNILAG Law Review has come to stay in the world of legal scholarship. In just two years the growth of our publication has been tremendous, with readership from various continents both for our online forum and the print edition articles.

The quality of articles that featured in this edition are diverse, enlightening and thought-provoking. Various articles in this edition focused on the synergy between technology and our legal practice, fundamental rights and constitutional and parliamentary supremacy, registration of vessel, economic regulations, the capital markets, sports law and declaratory reliefs. Within this category of articles, specific attention has been given to the impact of technology in our legal practice. This piecemeal of information would be most useful for lawyers especially in this technological revolution as almost every technological problem need a legal solution and vice versa.

I would want to thank the editorial board for meticulously assessing the manuscripts that were submitted, thus enabling us to put together an excellent volume, and also the faculty for the support and guidance. Particularly to our staff adviser Professor I.O Bolodeoku for his constant guidance and teachings, we are most grateful.
I thank all the authors for their contributions to this volume, it was indeed well put together.
Once again, I would urge every reader to furnish their mind with this material of knowledge and to always remember the advice of L. Frank Baum that "No thief, however skillful, can rob one of knowledge, and that is why knowledge is the best and safest treasure to acquire."

Best,
Bolaji Jeffrey Ogalu
Editor In Chief 18'

GUIDELINES FOR CONTRIBUTORS

The UNILAG Law Review accepts submissions from all stakeholders in the legal profession within and outside Nigeria. Authors can either submit to the print journal or the online forum of the UNILAG Law Review. All references in the work must comply with the UNILAG Legal Citation Model (LCM). Submissions should be sent in word documents to; editor@unilaglawreview.org. For more details on how to submit and the various categories, please visit; http://www.unilaglawreview.org

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Conflation of Time: Analogue Practice & Digital Reality*

Professor Konyinsola Ajayi SAN*

1.0 LEARNINGS FROM PROFESSOR KASUNMU

Let me begin by acquitting myself regarding this paper, as it has been asked on social media, and even by Bola Olugboyegun,[1] why discuss conflation of time at a time like this, or at a lecture like this, historically devoted to searching questions of law?. Well, Prof A.B. Kasunmu SAN, the man we celebrate today for his 'cerebracy', himself led me to it, for he is *a lawyer of all seasons.* As was said of him in his 78th year in 2012:

> in the law profession, there are very few lawyers who perfectly fit into the three levels. The three distinct levels or divisions of the profession are: the academics, technocrats and practitioners. Alfred Bandele Kasunmu, a professor of law and the Osomalo born (Ijesha) lawyer is one of the very few and fortunate lawyers in that category. This man is what (*sic*) the literary giant; Professor Chinua Achebe, if he was writing about him, would have called 'A lawyer of all seasons' because he fits into all the seasons of the profession.[2]

This is what has led me to discuss the seasons of law and seasons of life: past, present and future - making plain that in this, this giant has not conflated time unlike the Bar and Bench on which he stands has. The profession, as all know, is indeed one of all seasons – the law, itself, being from time immemorial, today, and I assume tomorrow, one of the pillars on which the foundation of society stands. The law,

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* Lecture delivered at the Prof. A.B. Kasunmu Annual Lecture, Faculty of Law, University of Lagos. July 11, 2018.

* Prof. Konyinsola Ajayi SAN (with the assistance of Ms. Georgette Monnou & M/S M. Aghatise, N Onyeonoru & A. Ogunkanmi, all of Olaniwun Ajayi LP).

1 Sir (Prof.) A.B. Kasunmu's daughter.

2 See "Kasunmu a Lawyer of all Seasons" available at https://www.latestnigeriannews.com/news/280401/kasunmu-a-lawyer-of-all-seasons.html (accessed 18 July 2018).

as an important force in civilization, has four different functions.[3] These are:

(i) Defending us from evil, and this cannot be overemphasized today, in what we see around us in Nigeria – man's inhumanity to man, Hammurabic law of eye for eye, tooth for tooth, evil arrogance of our government, contumelious behavior of a few rich or powerful, the abject poverty of the people brought about by mediocrity and corruption in all their guises and mutations, and those men and women, who do these things and better described as the septic tank and soak-away of the excreta of evil;

(ii) Promoting the common good by laws that bring about social and economic equilibrium to society, and meeting our constitutional directives of state;

(iii) Dispute resolution, for as Yoruba people say, even the tongue and teeth fight; and

(iv) Promoting and steering people and institutions to doing good, by the burden and reward the law gives as reaction to human conduct and corporate activity.

That there must be laws to have peace and justice, without which there can be no progress or development, is not in doubt. Now whether the students of Prof A.B Kasunmu SAN, whether from Ife or Lagos, in Land law, Evidence or Family law,[4] whether through his years in inner and utter bar, or whether as his children or colleagues will be relevant in this age and that to come is the key issue I intend to face – for this is an existential question we seem to have lost in conflated time.

Can we tell the wood from the trees? Where is the voice of the Bar? What is its direction of travel? Has *stare decisis* done it bit? Has the Bar just been slavish to judicial precedent - applying yesterday's solution to day before yesterday's problem to today's crisis. This is the crux of the matter; and to better illustrate my point, I ask you to travel in time with me today to yesterday and tomorrow so we know how we too can enjoy today today and tomorrow today - beginning

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[3] See The Importance of Law available at wps.pearsoned.co.uk/ema_uk_he_mcbride_letters_3/248/63704/16308274.cw/content/index.html (accessed 18 July 2018).

[4] These are subjects Prof AB Kasunmu taught.

with lights out to show the starkness of day and night – as depicted by I-Robot.

2.0 SETTING THE SCENE: DIGITAL REALITIES?

So what is it that I have to say moving from the realm of fiction to reality or theory to practice? Simply these from I-Robot and our current realities:

First, the basic law of robotics, as we learnt from I-Robots, robots may not injure a human being, or through inaction allow a human being to come to harm; and robots that must obey orders given to it by human beings.

Second, the realization that the legal industry, in Nigeria, is even stranger than the fiction of I-Robot or any science or Movie-Magic fiction - as, both Bar and Bench live in an unreal balloon filled with a false sense of worth and time.

Third, that in a world that has moved from: binary concepts to blockchain technology; from porcelain fillers to 3D printers; from several incisions to keyhole surgery; from reliance on human capital to artificial intelligence, the conversations surrounding law and technology has gained renewed focus.

In sum, we live in a post-industrial age, one driven by technology and innovation, where you will be replaced by a robot if you do not stop being a robot: a slave to the past, as demented by unsavory ways of the present, clutching on straws of precedent (an adjective), rather than rely on precedent (the noun). The interplay between law and technology no doubt trickles down to the legal profession, bringing to it digital reality – yet the practice of law in Nigeria is still analogue, and its practitioners still living in conflated time – giving robots (be those machines, software, apps, or foreign lawyers) the reason to break the three fundamental laws of robots as presented to us in I-Robot.

Truth of the matter is that the implementation of technology in the workforce, and indeed legal practice: (Bar and Bench), offers boundless innovation, and empowers both workers and entrepreneurs; judges and lawyers; partners and tenants; and all others concerned or involved in the settlement of disputes. Critics, however, argue that technology disenfranchises the workforce and undermines workers' rights. Taking things a step further, could our profession run the risk exemplified in Will Smith's I-Robot? In Alex Proyas' 2004

science fiction epic, a creation of U.S. Robots and Mechanical Men (USR), were at the helm of many daily operations. The robots were sales assistants, law enforcement officers, aides, professionals, factory workers and perhaps also lawyers. As the film progresses, we realise that these robots that humanity once trusted, that humanity created for its personal aide had metamorphosed into killers controlled by one robot with uncanny adaptability. What is the moral here? Two things. That advances through innovation has come to law, and can affect us for good or bad. Advances could create jobs, but take away jobs we have today. Robots may displace us in the legal system, and apps may be found to have better meaning to users of the system and society at large.

I-Robot brings home another truth. Today Artificial Intelligence (AI) is being used by professionals all over the world to improve on daily tasks – the law is not spared. Hence, artificially intelligent legal solutions, such as Kira Systems[5], eBrevia[6], Wevorce[7], IBM's Watson[8] and ROSS Intelligence, [9] are reshaping the legal market in other parts

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[5] Kira Systems**,** provider of technology enhanced contract review and analysis software see https://info.kirasystems.com/blog/topic/legal (accessed at 18 July 2018)

[6] Used by law firms and corporate legal departments to more efficiently, accurately, and cost effectively extract and summarize key provisions from legal documents. See https:ebrevia.com

[7] Wevorce offers web-based technology and a community of trained attorneys, counselors, and other experts to help couples divorce amicably. See https://www.wevorce.com/

[8] Watson is a question-answering computer system capable of answering questions posed in natural language, developed in IBM's DeepQA project by a research team led by principal investigator David Ferrucci. Watson was named after IBM's first CEO, industrialist Thomas J. Watson see https://www.youtube.com/watch?v=_Xcmh1LQB9I

[9] ROSS Intelligence Cofounders, ROSS Intelligence Arruda, Dall'Oglio, and Ovbiagele cofounded of Ross Intelligence, a legal research engine that uses artificial intelligence to automate legal processes making them more efficient

that aware awake to the season and not taking time as fixed as judicial precedent. While, [one must applaud the literary brilliance of Alex Proyas and credit worthy performance of Will Smith], it may be hyperbolic to suggest that robots would at a moment's notice suddenly wipe out every professional in the hopes of taking over the human race – sight must not be lost that more or less in one full swoop innovation, like revolutions, ensure that old things are passed away, and all things are new, paraphrasing Paul as he was led to put it in 2 Corinthians 5:17.[10]

The days going, and gone in some places, where activities – [such as: legal research; prediction of legal outcomes; due diligence; and review of client documents] - could only be done by human beings. In 2015 alone, Kira Systems, an AI legal assistant was trusted with over USD 100 Billion Dollars' worth of transactions,[11] and AI technology systems such as Kira are currently in use by top professional services firms such as Freshfields, Herbert Smith Freehills, Fenwick & West LLP, DLA Piper, Deloitte and many more.[12] The beauty of these systems is that they free up time for lawyers to attend to other tasks which require that mortal touch: contract negotiation; client meetings; relationship management; appearance in court, etc.

It has become increasingly important for us as professionals to remain dynamic in this code based world lest we risk becoming irrelevant to clients. Those who believe that technology is reserved for Generation

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and less expensive – See https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/profile/rossintelligence/&refURL=https://www.bing.com/&referrer=https://www.bing.com/ (accessed 18 July 2018).

[10] Therefore, if anyone is in Christ, the new creation has come: The old has gone, the new is here!

[11] See "Kira Diligence Engine Exceeds 100 Billion in Transactions" https://info.kirasystems.com/news/kira-diligence-engine-exceeds-100billion-in-transactions (accessed 18 July 2018)

[12] See "DLA Piper unveils New Partnership with Ai Firm Kira Systems" http://www.globallegalpost.com/global-view/dla-piper-unveils-new-partnership-with-ai-firm-kira-systems-27829722/. (accessed 18 July 2018)

Y - a generation of digital natives who have advanced in a world punctuated by technology and more often than not check their emails, texts and social media accounts before they get out of bed, is gravely mistaken. The reality is that many of these digital natives are masons of business edifices, leaders of conglomerates. According to the Bloomberg Billionaires Index (BBI), two weeks ago, Facebook's co-founder Mark Zuckerberg overtook Warren Buffett as the world's third-richest person[13], further solidifying technology as the most robust creator of wealth. Zuckerberg, who trails only Amazon's founder Jeff Bezos and Microsoft's co-founder Bill Gates, eclipsed Buffett as Facebook shares climbed 2.4 percent. It is the first time in history that the three wealthiest people on the BBI ranking made their fortunes from technology. These leaders form the bulk of our clients, and to bring it home the likes of Paystack and Konga.

We currently serve clients with huge enthusiasm for technological innovation. Tech has become the lingua of efficient service delivery, especially when compared to client experience delivered by large technology companies such as Google or Apple. We live in a world where iron sharpens iron or rather where Java spring boards innovation in C++. Mind you this is not to say I ignore our own Aliko Dangote. No never. He is the richest black man, richest African, richest Nigeria and yes like Warren Buffet, just displaced, his money is in those basic tangible essentials of life. But his story speaks to our crisis in law: innovate or die; conflate time and be wiped out or at best relegated just as he by sheer force of regarding time as a continuum or ever rolling stream, dusted not to be seen many in the space who were blind-sided by being stuck in yesterday's solutions.[14]

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[13] See "Facebooks Mark Zuckerberg Overtakes Warren Buffet is Now The Third Richest Person in the World" https://scroll.in/latest/885644/facebooks-mark-zuckerbergovertakeswarren-buffett-is-now-the-third-richest-person-in-the-world (accessed 18 July 2018)

[14] Statistics, from various publicly available information, show Dangote is probably the largest employer outside government, with the best result in terms financial size and efficiency analysis.

There are many who believe innovation is the key to transforming the legal profession. A leading light in law, Chief Tony Idigbe SAN, has been reported thus:

> …new technologies have changed the way of doing things and lawyers must embrace them to remain relevant … from the way the legal sector and the judiciary from the way things are going in Nigeria, judges are becoming more technically prepared for the future than the lawyers, pointing out that very soon such, lawyers will begin to face challenges in court if they don't embrace the new technologies. He said clients are becoming more demanding and they are no longer ready to pay too much for legal services, at the same time they want speed and efficiency from lawyers they don't want the waste of time and the volume of work is increasing. 'So the only solution is to apply technology, technology will able to enable lawyers to do the work within a very short time.' … He said in Nigeria, it is clear that whilst the top 50 law firms control between 30 to 35 per cent of the fees, but employ less than 2000 lawyers leaving the vast majority of about 188,000 to scramble for about 65 per of the market. "Survival of law practice for many will depend on their creativity. How many lawyers made money during the Banking crisis in Nigeria?" he asked." [15]

His thesis is clear: the profession is grasping for breath about to be asphyxiated by the Bench; being analogue; external competition and monopoly of 30 – 35% of the market by only 1% of the profession. [Without getting into a debate on these numbers],[16] one cannot but

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[15] See The Nigeria Lawyer of 08.VII.18 reporting Keynote address at the Law week of the Kaduna Branch of NBA titled "A profession grasping for breath: Modern challenges, prospect & opportunities of legal practice" – See "Lawyers Must Embrace Technology To Thrive In Practice – Idigbe SAN" available at http://thenigerialawyer.com/lawyers-must-embrace-technology-to-thrive-in-practice-idigbe-san/ (accessed 18 July 2018).

[16] Figures from the NBA suggest that only about 160,000 have been registered as lawyers in Nigeria, with many long taken away by time, or relocation or

agree with this man of the season – but with more to say about the vision.

3.0 ANALOGUE PRACTICE

I stand my watch, and set myself on the rampart, and watch to see what the evidence will be. So, conflating eternal words,[17] I write the vision making it plain on tablets, that all of us in the profession may run. For though the vision is yet for an appointed time; but it even now speaks. Though the end tarries, till it comes, yet we cannot afford to tarry, because I believe, however, that the legal profession in Nigeria is in danger of extinction because of our conflation of time – and this is not just about technology! Imagine these news clips:

At a reported meeting of Middle Belt Lawyers Forum there was a motion and later a counter motion for adoption of an NBA Presidential candidate; and that the motions will be considered if there was reciprocity from all other forum on accepting Middle Belt candidates.[18]

Ikeazor Akariwe has threatened to sue the NBA for amending its constitution to exclude lawyers in its zoning arrangement from contesting four elective positions where they live and practice… According to him, the sum effect of Section 2 (2) schedule 2 of the NBA Constitution is to deny persons in certain peculiar positions the right to contest for any of the offices of President, first, second, third Vice-Presidents or General Secretary when any of those offices are zoned to their geographical zones of practice, aside from their geographical zones of origin.

> To debar me from contesting elections into any of the stated offices from my geographical zone of practice, in preference for a geographical zone of origin not only offends against the

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abandonment of the profession. Data on income is perhaps not readily available.

[17] Of that Great Prophet in Habakkuk 2:1 – 3.

[18] See "Middle Belt Lawyers Forum Rejects Call for Adoption of NBA Presidential Candidate" available at http://thenigerialawyer.com/middle-belt-lawyers-forum-rejects-call-for-adoption-of-nba-presidential-candidate/ (accessed 18 July 2018).

> spirit and letter of the Nigerian constitution, it is beneath the dignity of the NBA,

He declared. Akaraiwe, who is from Delta state, which falls into the South West in NBA zoning arrangement, said he had practised in Enugu for 32 years since 1985 and should be allowed to contest there, having served the Association in different capacities in Enugu Bar.[19]

According to another Bar man of all seasons, Prof. Fidelis Oditah QC, SAN, the Senior Advocates, have not been shunned in the appointment of judges, when in fact in other climes they form 99% of those appointed, with over 60% of reported decisions being those of trial courts. He notes that the false start of picking from the Utter Bar to the Court of Appeal and Supreme Court bench in 2017. [20]

In discussing impediments to the administration of justice, Oditah notes the defect in appointing judges in a wholesome way; [21] just as he came down heavily on the manner of preferment as a senior advocate including national character and geographical spread. [22] I should add the greater concern is of putting merit as a thing of the past and ethnic balancing as a thing of the future in appointment of judges at all levels in Nigeria.

There was a time when appointments were made from the Bar and the Trial Courts to the Supreme Court, giving us the immeasurable pleasure of reading the decisions of Oputa JSC, or Nnamani JSC or Elias CJN; and enjoying today what the wrote yesterday for the future. It is now (*sun kenren sun kenren*), turn by turn Ibadan system to

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[19] See "Ikeazor Akariwe Threatens To Sue Nigeria Bar Association (NBA) Over Zoning" available at http://thenigerialawyer.com/ikeazor-akariwe-threatens-to-sue-nigeria-bar-association-nba-over-zoning/ (accessed 18 July 2018).

[20] See Fidelis Oditah, The Evolving Role of Senior Advocates in the Administration of Justice and Nation Building**,** A Lecture delivered at the SAN Maiden Annual Lecture on 28 June 2018 at Intercontinental Hotel Lagos, Nigeria, pp 7 & 8.

[21] See Fidelis Oditah, ibid, pp 19 & 20.

[22] See Fidelis Oditah, ibid, pp 12.

kingship – depriving the society of men and women who would make us all experience tomorrow today!

[From these few random samples], the overwhelming evidence, [as we know it from the teachings and writings of Prof. A.B. Kasunmu SAN] is that legal practice in Nigeria is very much analogue. Not even that 1% Chief Idigbe SAN speak of can boast of any digital reality as a group! What with work life balance; a proposition on the people that do the work for these partners or outstanding barristers; the volume of paper required in filing papers, especially copies of volumes to appeal courts; the "shouting" about ICT in the courts – no better in effect than the weight of tiny black ants. What with requiring all lawyers to have an email address tied to the Supreme Court; or court recorders that cannot produce immediate transcripts; or E-filing that still requires papers to be filed?

[As mentioned earlier],[23] this is a travel in time, and I ask that you journey with me in understanding how we have conflated time. The imposition of federal character, geographical spread, ethnic balancing, seniority and other elements that reward mediocrity (in the appointing of Judges and selection of senior advocates),[24] was a solution introduced during the early days of our khakistocracy, not to bring some down, but take some up and more importantly create for a sense of belonging and common wealth in a country just emerging from a civil war. So these were solutions of the late 1970s for a problem of the late 1960s and its time. It was perhaps acceptable to many at that time as perspicacious, (even if seen by others as a necessary evil).[25] But in the face of death by mediocrity can the Bar and Bench afford to compromise merit and integrity to such extent as to make these simple handmaids? [26] We seem to have left substance for form applying

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[23] See paragraph 3 above.

[24] See Fidelis Oditah, loc. cit.

[25] See for example Aliyu A. Ammani, The Federal Character Principle as a Necessary Evil – available at http://www.gamji.com/article8000/NEWS8603.htm (accessed 18 July 2018)

[26] Borrowing the words of Oputa JSC in Willoughby v IMB [1987]LPELR-109/1985 pp 40 – 41 (an appeal handled by Prof A.B. Kasunmu SAN) in speaking about substance and form.

the analogue post war solution proffered by Murtala Mohammed in 1975 to existential crisis faced by a profession blind to the digital age – putatively because Lady Justice is blind? We need to refocus on the grand objective of the judiciary – delivering justice, which would influence and sidestep the preoccupation of the judicial system with satisfying federal character rather than the merit of those who sit on our bench.

Chief Tony Idigbe SAN, has posited that 99% of Nigerian lawyers scramble for what is left of the market by just 1% of it. This is a telling tale and sign post to what is in evidence before us, which we the experts of land law and family law, (Prof A.B. Kasunmu SAN), must resolve for us as a family in this land! Even the lucky one percent do not know what is in store for them, as technology and innovation make them irrelevant daily. The Bench and the market are said to be leaving the Bar behind;[27] just as it is true that foreign law firms continue to chip away of the cheap hill these ones stand on. Note for example the role of foreign lawyers in the growing and rewarding field of arbitration; the intervention of the former US Attorney General in the dispute between MTN and the Federal Government; and the use of foreign law firms by Nigerian private and public interest entities. The stifling nature of applying practices that matured at the time Prof A.B. Kasunmu became a senior advocate, in the 20th century, to the emergency the profession faces today, tomorrow, only continues to make the Nigerian lawyer is physically, economically and socially disadvantaged!

Compared to other professionals like accountants, engineers and bankers, who number far less than lawyers, whose professions in Nigeria are much younger, are now much better organized as institutions that last, earn a lot more and have thus displaced lawyers from the height of respect and nobility it had. Law firms are small, if not tiny given the litigious nature of Nigerians, the sheer number of Nigerians, the size of the economy, achievements of Nigerian lawyers and judges in the past at home and abroad, and the age of the profession. Yet law firms are not considered worthy of the benefit of

[27] See Tony Idigbe, loc. cit.

incentives offered micro, small and medium enterprises. Law firms need funds to grow.

Conversely, young lawyers are paid less than the pitiful minimum wage prescription of the Federal Government,[28] on the pretext that barristers are independent and should fend for themselves by winning instructions. Lawyers are treated by some of their employers as domestic staff, and many are subjected to conditions that the National Industrial Court will frown upon as against human rights, and minimum standards of engagement. Fact is the delivery room for the NBA, as is the bulk of its active members, are young people. Talented ones that think laterally and though brought up in a culture where it is only money and power that matters do not have the patience of the senior juniors and seniors at the Bar. The profession faces a rebellion if we keep conflating time.

It must be understood that the roles of lawyers have changed drastically and we have to face the fact that we as lawyers shall be doing a very different job from our predecessors. Learning and innovation is a continuum which exists concurrently, thus we cannot in our arrogance believe that the achievement of yesterday is sufficient for tomorrow's challenges. A personification of this is the state of affairs in the Nigerian legal sector, where artificial intelligence and disruptive innovation is transforming the legal profession in diverse ways. Now is the time for all law firms to commit to becoming AI-ready by embracing a growth mindset, set aside the fear of failure and begin to develop internal AI practices.

4.0 INNOVATE OR DIE: THE LEGAL PROFESSION'S LAST STAND

In recent times, the spirit of innovation has created the latest technology. Managing and adapting to the pace of change has become

[28] Currently N18,000 or US$50 a month (see "Nigeria Minimum Wage Scale" available at https://www.google.com/amp/s/www.naija.ng/amp/1136817-nigeria-minimum-wage-salary-scale.html (accessed 18 July 2018)) (though the FGN has announced plans to increase this September 2018). No wonder Nigeria has the highest number of poor people in the world.

integral to attracting and retaining the top talent, clients and instructions. Ensuring equitable administration of justice through more innovative means and practices becomes a necessity rather than a want. The imperative is thus that we must be clear-eyed in this industry otherwise it will die as some have in our very eyes. Innovations today come with merciless and terribly fast disruptive forces that land on you like an invincible and irresistible army. This has been the lot of "*b'ole kája*"; patent medicine stores; and discount houses in Nigeria – and can be so for analogue practice too.

As a profession, our mode of dressing, application of obsolete laws and redundant solutions for tomorrow's problems continuously threaten the fulcrum of experiencing tomorrow, today. Technological dynamism has necessitated the need to stay ahead of the curve. However, constant exhibition of lethargy by the Bar and Bench in adapting to the times and era has stifled growth and strangulated innovation. The bench akin to the pose of the Lady Justice has masked its eyes to the future while the Bar which hopes to remain at the cusp of innovation and technology in its ignorance attempts stasis, and thus regresses.

The reversion seems evident across every facet of the legal profession particularly the judiciary. The independence of office and manner of appointment imbues trust in the judges and the outcome of their decisions. Thus, [at the risk of being a scratched record], the point must be made that the imperative to adopt a system of appointment based on merit and integrity as opposed to the current system based on federal character and quota allocation which represents nothing but a passing interest among certain stakeholders. The need to appoint deserving judges is a prerequisite to achieving justice predominantly as the ignorance of the judge is the calamity of the innocent.

Although, our laws are not written in the sand to be washed away by each wave of new judges appointed into office, it has become impracticable to remain with the times and allow the relics of the past to determine the progress of the future. The world evolves and so does our law. The old passes and makes way for the new, for the constant is change. This paradox is as true of judicial precedent as it is of a society that survives, not on the travesty of stagnancy but on the pillars of innovation. There is an urgent need for reform both in substantive law and practice. The grappling effect of stare decisis has

its fists wrapped firmly on the larynx of innovation, stifling legal dexterity and judicial emancipation in the process. This irony exists where a court adopts a precedent, notwithstanding its apparent impropriety to the case before it, in order to represent the lofty status as the emblem of a stable judiciary. In reality, the poorly-reasoned precedent inks the blueprint for a set of legal principles that exceed the bounds of underlying enactments and becomes the basis for future precedents.

> The problem is further exacerbated by the failure of judges to clearly delineate the boundaries between edict and dictum, and the few who have attempted to detract from this position have been accused of judicial rascality. This continues to beggar belief that a Judge who reasons and is perspicacious and wise is said to be a scoundrel. To this end, our judges are called to disregard fusty traditions and a disingenuous allegiance to narrow conceptions of law and rather emancipate themselves from the tyranny of precedents rooted in the past, as judicial innovation is usually birthed by broken precedents.

As competition becomes stiffer, more business-centric and technology-led methods of delivering legal services will precipitate a paradigm in the prevailing systems. Increased pressure for law firms to deliver timely results at cheaper and more efficient rates would necessitate the implementation of tech-enabled systems. This shift which begun about four decades ago in gas stations with self-service pumps is gradually becoming the norm in more conservative fields including the legal practice where humans run the risk of being displaced by AI technology for profit maximization and efficient operations. Accordingly, the need to implement new technology in calibrating internal systems to retain your competitive edge as a lawyer in the 21st century should be at the fulcrum of the legal practice. This could lead to a dramatic reallocation of tasks and an even more specialised way of answering clients and offering strategic solutions to their needs.

As the bastion of decorum and humanity, it is necessary that innovative processes and tech-enabled systems are extended to the judiciary. Our courts and justice system are constantly bedeviled with lost case

files,[29] tampered evidence and inhumane conditions in courtrooms (where lawyers are required to be fully robed under excruciating weather conditions). Hence, the utilization of technology in presentation of evidence through the use of Digital Evidence Presentation Systems (DEPS) which enables a digital presentation and recording of evidence to aid effective decision making as well as electronic filing systems would ultimately imbue trust and confidence in the system by potential investors. Imagine a Judge insisting on a *locus in quo i*n a land matter, as Prof. A.B. Kasunmu SAN taught him or her, in an age you can get a correct terrain or satellite imaging by GPS.

5.0 THE LAW IN SOCIETY – WHERE TECHNOLOGY IS IN POWER, THE PEOPLE REJOICE!

Although there is an unmistakable trend toward utilizing technological advancement, what has become clear is that beyond a trend – life and the processes of life and work have become inseparable from technological aid. In Nigeria, with the proliferation of co-creation hubs; tech startups; and the commoditization of the internet – the pulse of the country is being tracked by its innovation: not just mere innovation, technological innovation that traverses industries as disparate as medicine; engineering; banking; and the law!

The legal industry, over time has been stubborn in protecting itself from change. We pride ourselves in our rote processes, and systems: "…it has always been that way, it works…" should this be a justification to resist change? The bitter truth (or sweet, depending on your side of the divide) is that technology has come to stay. Its steady march is now at the weakened doors of the legal industry – to fight is futile, to be awake and tactical is wisdom. We must, therefore, surrender on our own terms on being the victor and not the vanquished. Lest we forget, accountants, estate agents, investment bankers and even foreign law firms, are eating our lunch! So this is real and thus goes beyond just technology.

[29] See "Nigeria's Judiciary: A messy state" available at https://www.pambazuka.org/governance/nigerias-judiciary-messy-state (accessed at 18 July 2018).

But at the core of our predicament is the digital reality that looms large but we do not see: technology and the creative mind. There are three main considerations when discussing technology in the legal industry. These three considerations ground the analysis of the digital reality that inexorably continue to redefine the legal landscape. Essentially, digital advancements must be addressed in the context of: (x) lawyer welfare considerations; (y) efficiency of the practice; and (z) efficiency of adjudication. While these are imperfect categorizations with the potential to overlap, permit me to set the discourse on this basis.

5.1 Welfare Considerations:

The floodgates of technological advancement have redefined how we work. The legal industry is slowly catching on to the tidal change in workplace culture. This reality is not influenced by companies who necessarily intend to cut staff, but those who have found ways to reduce costs while maintaining work strength. The confluence is met with the increasing flexibility among the work force, and a realisation that the utility of the "office," as we know it is fading in favor of the digital office, personified in flexi-hours and a portable workspaces. Meetings by Zoom, Appear-In and Skype; correspondence by WhatsApp, and documentation as well as signatures that are fully digital. Records that are kept in the cloud; and test of veracity by algorithms rather than the impression of the Judge seeing the witness in person.

The gig economy notwithstanding, the practice of law has been marketed as a long-term profession. Many young lawyers must have been told the phrase "…buckle up, pay your dues…" The implementation of legal technology is making a serious attempt to address this. Traditionally, judicial systems that elevate training concepts such as pupillages in the training of lawyers are slowly receding to the background: not fit for purpose. The training of the 21st century is that which incorporates technological advancements to redefine the way we train our lawyers. The hard copy law reports have been relegated to the electronic screens of Lexis Nexis, Westlaw and Law Pavilion. The long hours many young lawyers spend on researching, conducting due diligence and contract review are now completed at the click of a button! The discourse on employment has

now moved to whether young lawyers would be engaged for research when AI can do this more efficiently. Is this problematic?
Some believe so – but so too do they believe in Uber as a poison to transport, Amazon as incompatible with shopping; iPads as the death knell of libraries. AI has now called for the profession to change its focus in the training of lawyers to other skills such as negotiation of contracts, business development and spotting issues in various contracts using templates churned out from Ross and IBM's Watson. Accordingly, this advancement in technology calls to question whether the democratisation of law can be categorised as a haphazard attempt to curtail a horse that has bolted or not? These are questions that, as a young lawyer, I never had to consider – these are questions that you must now consider. You cannot game the legal profession of today with the tricks of yesteryears.

5.2 Efficiency of the Practice:

Closely linked to the welfare considerations underpinning the 21st century legal practitioner, is the efficiency that must ordinarily undergird the way the practice of the law is delivered! This is not a clarion call to be more efficient, but a warning that a failure to adopt best practices would necessarily lead to the hallowed chambers we sometimes hold dear, falling like a pack of cards on the dusty law volumes that hold firm our libraries.
Unlike the clients of the '70's who could be impressed by the pleasant sounding Latin of our legal principles, the 21st century client has become accustomed to a service level that seeks for clarity of language, brevity of advice, speed, without sacrificing accuracy or content on the altar of efficiency. These generations of clients are accustomed to rely on technology for the delivery of services that ordinarily were viewed – in actual terms, impossible. Who would have expected that your google mapped smartphones could game the Lagos traffic routes better than your average Lagos cabbie… or again, that video communication would transcend the tales of witchcraft! Banking infrastructure that was once viewed in terms of dollars sunk in

concrete buildings, are now envisioned in Apps like MPesa[30] or GTB's 737 that transcend borders on invisible wavelengths. For the legal industry to blind itself to these developments, would result in the Blackberry effect: losing the game plan, and ceding the field to the iLaw. The legal industry is not spared from the assault of technological advancement! While many lawyers are conditioned to the erroneous belief that the practice of the law is unique and preserved from attempts of technology to influence every area of business, non-traditional firms such as PwC[31] are investing seriously in the practice of law and developing artificial intelligence that enables such accounting firms chase and overtake traditional law firms in their delivery of law. The formula is simple reduce potential billable hours and accordingly reduce costs, while delivering speed and efficiency through coding algorithms.

Courts requiring tons of paper that will end up being sold to groundnut and *boli* hawkers and for street food vending; lawyers drafting long agreements with lengthy sentences; not leaving the past to live in the future only count to further reduce the plummeting reputation, diminishing influence and shrinking purse of the legal industry. Consequently, with Nigerian law firms seeking to compete in a global world and retain their clients from the beauty parade of international law firms, and other competing domestic professionals, they must, as a matter of necessity begin to think on how to game technology to deliver efficiently and in a cost effective and qualitative manner. In sum, there must be a radical shift in the practice of law – without this shift, AI technology such as Ross and IBM's Watson would take the place of lawyers and confine the profession, to the extent we know it, to the assembly lines of the manufacturing industry – now replaced by robots!

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[30] See "Money via mobile: The M-Pesa revolution" available at https://www.bbc.com/news/business-38667475 (accessed at 18 July 2018)

[31] See "Ey, Deloitte and Pwc embrace Artificial Intelligence for Tax and Accounting" available at https://www.forbes.com/sites/adelynzhou/2017/11/14/ey-deloitte-and-pwc-embrace-artificial-intelligence-for-tax-and-accounting/#5bd634153498 (accessed at 18 July 2018).

5.3 Efficiency of adjudication

The question remains, how does a tech enabled Bar function within the context of a moribund judiciary? It is a poorly held secret that the Nigerian Judicial system, in many ways, is stuck in the past. When we advocate for electronic filing in the courts; automatic court recording applications for judges; state of the art database systems of statutes and precedents, we are not advocating fanciful makeovers, but seeking to foster the change that delivers the mandate of the judiciary – dispensing justice! It is another open secret that the courts are inundated with cases, and the judges need assistance to manage their dockets, yet we are not prioritizing automatic recording applications for the judges, nor are we providing proper assistance: be they technological or highly skilled law graduates, to assist with this. I lend my voice to that of many others, taken to a crescendo by the descant of Oditah,[32] in describing the obsession with procedure; misuse of jurisdictional objections and interlocutory appeals by lawyers, and tolerance of the same by the Bench in the name of justice; and the shambolic state of nearly all court registries. All these are transponders transmitting a signal to the market that the law is analogue and intends to its ground – failing to know the ground is sinking sand.

Is it not problematic that many times cases are bogged down on technical arguments as to whether a lawyer as opposed to the firm, or even recently whether not ticking the name of the lawyer that signed the process goes to jurisdiction?[33] Is it not amazing that cases will go to whether a stamp and seal was properly affixed on a document when, in actual fact, blockchain technology would be a cheaper more

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[32] See Fidelis Oditah, *ibid*, pp 13 – 18.

[33] See Williams v Adold/Stamm International (Nig) Ltd [2017] 6 NWLR (Pt 1560) 1 at 19-20, paras E-B - a recent Supreme Court decision that a process signed by Chief Ladi Williams SAN, (with a list of lawyers), without ticking his name is in order.

sustainable mode of ensuring that processes are by lawyers?[34] Why push for all lawyers to have a Supreme Court email address, when we can instead push for real electronic filing of court processes in court that sidesteps the manual method of allocating cases, which consequently delays and robs the people of their rejoicing? The issues are real, because the speed of the judiciary is not merely about looking modern, but it is about freeing up the courts to decide cutting edge issues impacting on civil rights and obligations in complex and novel areas of law – issues dealing with blockchain technology; entertainment law; cybersecurity and real security issues pervading the country.

A failure to heed would result in an aversion from the courts as an adequate adjudicator, and the replacement, in many more instances with arbitration, and other forms of dispute resolution. To the extent that these are in keeping with sound public policy to reduce the time and cost of litigation it is fine. The problem however is that with some of the procedures employed to force settlement, with forcing litigants to the mediation centre, and the pre-trial conference methods, justice delivery is simply getting costlier and more time consuming. Besides, there is a big question mark, yet to be addressed on the propriety, if not constitutionality, of driving away a litigant from court to a mediation centre. If nothing it smacks of "big state" knowing what is right for you. The bigger problem is not this outsourcing of justice delivery through courts of record, (which the Court of Appeal is now aping), but the usurpation of powers of the courts by both the executive and legislative arms of government. Lawyers should have no hand in this: petitioning EFCC, the Police and National Assembly to intervene in civil matters under the guise of they being criminal matters or those requiring legislative intervention. Judges should also find these to be contumelious, and punish the same. Unless arrested, the slide to self-help will increase, and the resort to means outside the ecosystem of lawyers and Judges will accelerate rather than reverse the loss of the golden opportunity for the courts to develop the body

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34 See generally on the use of blockchain to verify information: https://www.newsbtc.com/2018/03/23/verisart-using-blockchain-to-verify-the-authenticity-of-art/ (accessed at 18 July 2018).

of law, in order to address 21st century issues that impact directly on the economy and how business is practiced, within the context of regulations.

6.0 CONCLUSION: ANALOGUE PRACTICE OR DIGITAL REALITY

In spite of the fact that time is an ever rolling stream, Prof. Alfred B. Kasunmu KJW SAN, has been able to leave a stamp on time. Sojourning from far away Ilesha, he returned near home: Ile Ife, to drop his anchor in that ever rolling stream - law and justice - producing some of the finest minds in this clime, even if they are identical twins[35] that make many of us think time is conflated. The need for renewed thinking in our adjudicative practices, and renewed methods toward the practice of the law are not forced concerns. They are reflective of the world around the law, the world in which our jurisprudence develops. As we have seen with industries who have folded in the face of technology, it has become clear that the survival of the practice of law, and the courtroom adjudication of same, is predicated on the ability for the law, and those who are its ministers, to embrace technological advancement and utilize it in the practice of law. Malcom X once said: "The future belongs to those who prepare for it today" So we, as a profession, must stop celebrating the past and instead plan for the future.

In a brief history of Prof A.B. Kasunmu's work, the evidence, he taught, is that the relevance of yesterday's solutions for the problems of the future, is now inadmissible. Let us all learn from this gentle giant of the mind. With a full body of hair in his head at 84, firm skin, retentive memory and sharp skills – he is a man blessed with yesterday's joy, and yet experiencing tomorrow today – seeing all his children, are lawyers doing well in his eyes.

As blockchain technology, internet of things and artificial intelligence proffered advice redefines productivity, profitability and sustainability, we cannot afford to conflate time in law. As we encounter 21st

[35] His daughters Tosin Adekoya & Toyin Hassan-Odukale - who make many save a few confused as what is real.

century realities, can the Bar be online and the Bench write by 3D Printing? The conversation is on a redefinition of the legal landscape. We all have to get into it for the truth is time is not conflated - our profession is and as a scholar Dr. K.U.K Ekwueme would say it is a paradox of contradictions.

The Unintended Consequences of Consumer Finance Regulations

Erika Davies and Joshua Hall*

1.0 INTRODUCTION

Behavioral economists, Richard Thaler and Cass Sunstein, highlight the numerous cases where consumers make seemingly irrational choices that leave them worse off.[1] They point to behavioral biases that hinder consumers' ability to either select or stick with the optimal choice. While in many cases the impact of irrational behavior is relatively benign, the authors demonstrate how biases can lead to substantial harms. For example, myopic behavior leads many to under save for retirement.[2] Behavioral biases may also lead some consumers to choose a more expensive home mortgage loan.[3]

Consumer finance is an area where the potential for harm stemming from behavioral biases is especially large.[4] For example, behavioral biases may explain why some consumers fall into a debt trap by taking on high interest debt that they cannot repay.[5] When faced with an immediate need to pay for an urgent expense like rent or car repair,

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1 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008); Richard H. Thaler and Cass R. Sunstein, "Libertarian Paternalism", (May 1, 2003) *American Economic Review* 93, no. 2: 175–179.

2 Richard H. Thaler and Shlomo Benartzi, "Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving" (February 1, 2004) *Journal of Political Economy* 112, no. S1: S164–S187.

3 James Lacko and Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment* (Washington, DC: Bureau of Economics, Federal Trade Commission, 2004).

4 William J. Congdon, Jeffrey R. Kling, and Sendhil Mullainathan, *Policy and Choice: Public Finance through the Lens of Behavioral Economics* (Washington, DC: Brookings Institution Press, 2011).

5 Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of having less and how it defines our lives* (New York, NY: Times Books, 2013), 105–111.

some consumers engage in what is known as "tunneling." They tunnel their vision and focus exclusively on solving the problem at hand; yet they ignore the future downsides of their short-term solutions. Consequently, consumers take on high interest debt in an attempt to solve the urgent need for cash without fully considering how they plan on repaying the loan.

The potential harms to consumers from biased choices as well as the growing concerns over financial companies exploiting these biases for profit have led the Consumer Finance Protection Bureau (CFPB) to propose a range of regulations that would restrict consumer finance products.[6] For example, the agency limited the ability of financial institutions to extend residential mortgage loans to consumers; now the lenders must consider the consumers' estimated ability to repay the loan.[7] Less restrictive regulations focused on information disclosure requirements with regards to mortgage or credit card agreements.[8]

Most discussions of behavioral policies aiming to improve consumer choices focus on consumers' behavioral biases.[9] However, behavior change regulations involve two decision-making parties – the consumer and the regulator – both of whom are prone to errors. The consumer error, caused by behavioral biases, is the very reason for implementing behavioral regulations. Less attention is paid to the potential regulator error in identifying and estimating consumer bias. Yet, errors on the part of regulators may lead to flawed policies that ultimately leave consumers worse off than they would be without regulation.

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6 Adam J. Levitin, "The Consumer Financial Protection Bureau: An Introduction" (2012–2013) *Review of Banking and Financial Law* 32: 321; Norman I. Silber, "Reasonable Behavior at the CFPB" (2012–2013) *Brooklyn Journal of Corporate, Financial & Commercial Law* 7: 87–106.

7 Bureau of Consumer Financial Protection, "Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)," *Federal Register* 78, no. 20 (January 30, 2013): 6408–6620.

8 Kelly Cochran, "Fall 2014 Rulemaking Agenda," *Consumer Financial Protection Bureau*, November 21, 2014 available at https://www.consumerfinance.gov/about-us/blog/fall-2014-rulemaking-agenda/ (accessed 4 October 2018)

9 Sherzod Abdukadirov, Scott King, and David Wille, *Taking Paternalism Out of Nudge: The Case of Medication Nonadherence among Patients with Chronic Conditions*, Working Paper (Arlington, VA, March 2016), Arlington, VA.

In this paper, we examine the potential negative impact of the regulator error on consumers. We first describe the impact of behavioral biases on consumer choice. We then outline the two different approaches to behavioral regulation: restricting biased choice and targeting consumer bias. We examine the impact of the regulator error within the context of each approach and demonstrate that targeting consumer bias is less likely to lead to negative outcomes for consumers. We further demonstrate the difference between these approaches using a case study of CFPB's proposed payday lending regulation. We conclude with policy implications of our research for developing more efficient behavioral regulations.

2.0 BEHAVIORAL BIASES IN DECISION-MAKING

Behavioral biases describe seemingly irrational choices that leave individuals worse off.[10] What distinguishes them from simple errors is their systematic nature – most individuals under similar conditions make the same mistake. For example, patients are less likely to agree to a medical treatment if its outcomes are presented in terms of failure rather than success rates – this is what is known as the framing effect.[11] Another, real life example is the power of default choices. In a number of European countries, drivers can indicate on their license whether they wish to be organ donors. In countries where they have to actively choose to be an organ donor – the opt-in condition – the participation rates range between 4 and 27 percent.[12] In contrast, countries that enroll drivers by default and require them to opt-out of organ donation have much higher enrollment rates ranging between 86 and 99 percent. Thus, seemingly irrelevant factors appear to have significant impact on people's choices.

As behavioral economists Sendhil Mullainathan and Eldar Shafir point out, behavioral biases result from individuals economizing on their

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[10] for an overview, see Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2013); Sheena Iyengar, *The Art of Choosing* (New York: Twelve, 2011).

[11] A. Tversky and D. Kahneman, "The Framing of Decisions and the Psychology of Choice," *Science* 211, no. 4481 (1–30, 1981): 453–458.

[12] Eric J. Johnson and Daniel G. Goldstein, *"Defaults and Donation Decisions," Transplantation* 78, no. 12 (December 2004): 1713–1716.

limited cognitive resources.[13] They conceptualize a person's mental capacity to make better choices as bandwidth, which comprised cognitive capacity and executive control functions.[14] The cognitive capacity relates the person's ability to compare the available choices and identify the most cost-beneficial one. The executive control function refers to the person's capacity for self-control. If making a better choice requires individuals to expend considerable cognitive resources or self-control, they may choose a less beneficial option.

In general, behavioral biases fall into two main categories. In the first category, consumers economize their scarce cognitive resources, which hinder their ability to accurately evaluate the alternatives in order to identify the most cost-beneficial one. For example, many patients enrolled in Medicare Part D drug coverage plan fail to pick the cheapest plan because they are overloaded with the number of options and the complex pricing structure.[15] Similarly, consumers under react to hidden fees and taxes because such taxes are less salient to consumers.[16]

In the second category, bounded self-control leads to the so-called intention-behavior gap.[17] Consumers clearly understand which choice best serves their interest. But because this choice requires consumers to exert considerable self-control, many consumers fail to follow through on their intentions and to select or stick with the optimal choice. For example, many consumers clearly understand the benefits of losing excess weight but find it extremely difficult to maintain their regimen for extended periods.[18]

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13 Mullainathan and Shafir, *Supra note 5*.

14 *Ibid*. pp 47–56.

15 Douglas Hough, *Irrationality in Health Care: What Behavioral Economics Reveals About What We Do and Why* (Stanford, CA: Stanford Economics and Finance, 2014), 89–94.

16 Raj Chetty, Adam Looney, and Kory Kroft, "Salience and Taxation: Theory and Evidence," (2009) *American Economic Review* 99, no. 4: 1145–77.

17 Paschal Sheeran, "Intention—Behavior Relations: A Conceptual and Empirical Review," (January 1, 2002) *European Review of Social Psychology* 12, no. 1: 1–36.

18 Shahram Heshmat, "Behavioral Economics of Self-Control Failure" (September 3, 2015) *The Yale Journal of Biology and Medicine* 88, no. 3: 333–337

Cognitive demands can act as a barrier to making a better decision in addition to its monetary costs. Such cognitive demands may alter consumers' evaluation of various alternatives available to them. Consumers are less likely to select a more cost-beneficial option if it requires considerable cognitive resources.

3.0 BEHAVIORAL REGULATION

Regulations aiming to change consumer behavior typically do so by altering the costs associated with different choices. There are two ways behavioral regulations can change consumer calculations. Regulations can increase the cost of consumers' biased choice. Alternatively, regulations can reduce cognitive demands of decision-making by targeting consumer bias. While both approaches attempt to make the rationally optimal choice the least costly option, there are substantive differences in the way these approaches impact consumers.

3.1 Restricting Biased Choices

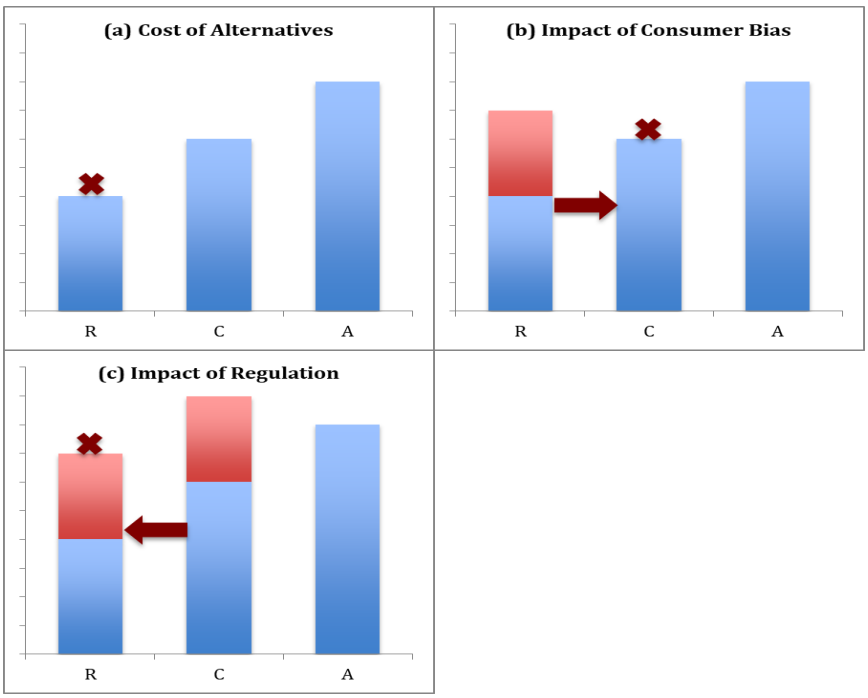
Under the first approach, behavioral regulations increase the cost associated with the biased choice through taxes or restrictions. Consider a case where behavioral bias prevents consumers from making a better choice. In this case, consumers are trying to achieve a particular goal, e.g. purchase an appliance or secure a loan. They have three options R, C and A to achieve this goal, each with a different associated cost. In the regulator's unbiased assessment, option R is the least costly and provides the best choice for consumers (figure 1a). However, due to behavioral biases, consumers overestimate the cost of option R and consequently choose option C (figure 1b). Option A is another, more expensive alternative.

The regulatory solution to the consumer error is to increase the cost of option C through either taxes or restrictions and consequently push consumers towards the optimal option R (figure 1c). An example of this approach is the energy efficiency standard, which restricts consumers' ability to buy less efficient appliances.[19] Similarly, soda

[19] Ted Gayer and W. Kip Viscusi, "Overriding Consumer Preferences with Energy Regulations" (February 12, 2013) *Journal of Regulatory Economics* 43, no. 3: 248–264

taxes and restrictions on selling sodas in vending machines attempt to push consumers towards healthier dietary choices.[20] A less restrictive example is rearranging food placement in school cafeteria in such a way that unhealthy foods are relegated to the back of the cafeteria.[21] An added inconvenience of reaching for unhealthy snacks pushes students towards the easily accessible healthy foods.

Figure 1: Regulatory Approach to Biased Behavior



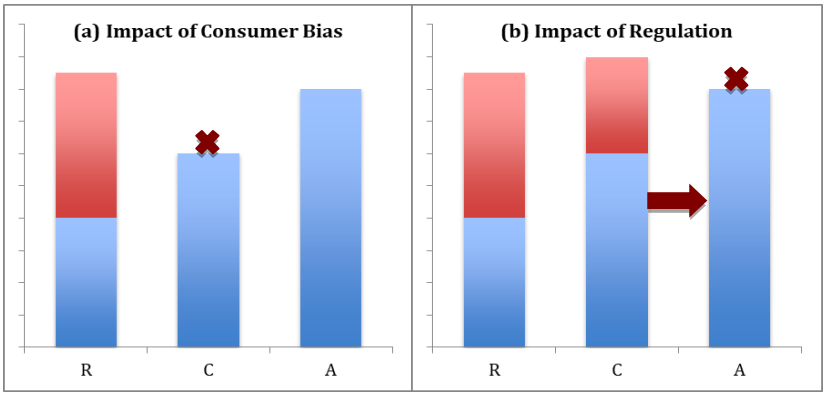
Yet, for behavioral regulations to work, regulators must correctly assess both the underlying costs associated with each option and the magnitude of consumer bias. If they do not, behavioral regulations may actually leave consumers worse off than under unregulated choice.

[20] Michael L. Marlow and Sherzod Abdukadirov, *Fat Chance: An Analysis of Anti-Obesity Efforts*, Mercatus Center Working Paper (Arlington, VA, March 2012), Arlington, VA.

[21] Andrew S. Hanks, David R. Just, and Brian Wansink, "Smarter Lunchrooms Can Address New School Lunchroom Guidelines and Childhood Obesity" (April 2013), *The Journal of Pediatrics* 162, no. 4: 867–869

Consider a case where regulators underestimate the magnitude of consumer bias (figure 2a). A regulation increasing the cost of consumers' current choice C may not necessarily push them towards the optimal choice R. Instead, it may push them towards a more expensive alternative A (figure 2b). For example, if consumers are too present biased, energy efficiency standard may lead them to postpone an appliance upgrade and leave them with an older and even less efficient appliance. Similarly, soda taxes push some consumers to other highly caloric foods.[22]

Figure 2: Regulators Underestimate Consumer Bias



Finally, consider a scenario where regulators are wrong. They underestimate the cost of option R and wrongly assume that it is a better choice for consumers. In this scenario, consumers are not biased; they rationally choose the least costly option C (figure 3a). By increasing the cost of option C, behavioral regulation pushes consumers towards the more expensive option R (figure 3b).

[22] Jason M. Fletcher, David E. Frisvold, and Nathan Tefft, "Can Soft Drink Taxes Reduce Population Weight?" *Contemporary Economic Policy* 28, no. 1 (January 2010): 23–35.

For example, studies found that regulators' routinely overestimate the energy savings delivered by energy efficient appliances.[23] In addition, consumers may prefer a less efficient appliance due to other, not energy related features.[24] Consumers opting for less efficient appliance may in fact be choosing the one that most fits their needs. By restricting their ability to choose the appliance they want, energy efficiency standards may leave consumers worse off.

Similarly, some consumer may be rationally obese. Studies show that over the long-term, most dieters regain weight after an initial weight loss.[25] Thus, some consumers may rationally conclude that the cost of dieting is too high and the benefits are too uncertain. Consequently, they would choose to forego the diet and satisfy their appetite instead. By forcing the diet upon these consumers, soda restrictions may be pushing consumers away from their preferred choice.

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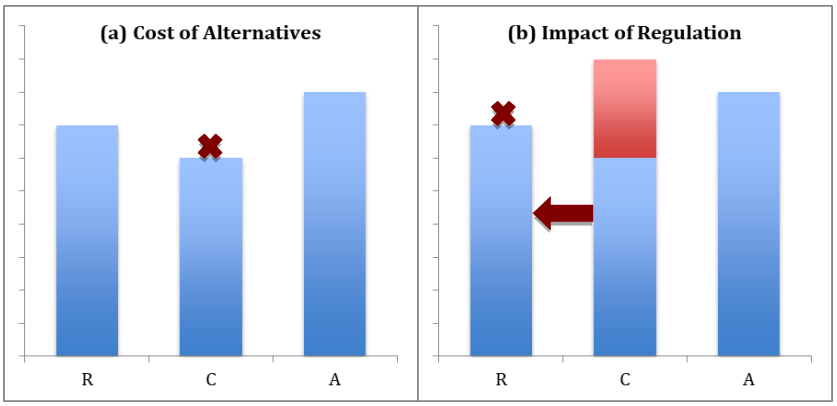
[23] Meredith Fowlie, Michael Greenstone, and Catherine Wolfram, *Do Energy Efficiency Investments Deliver? Evidence from the Weatherization Assistance Program*, Energy Institute at Haas, UC Berkeley Working Paper 261 (Berkeley, CA, June 2015), Berkeley, CA available at https://ei.haas.berkeley.edu/research/papers/WP261.pdf; (accessed 4 October 2018), Hunt Allcott and Michael Greenstone,*Is There an Energy Efficiency Gap?*, NBER Working Paper 17766 (Cambridge, MA, January 2012), Cambridge, MA, available at http://www.nber.org/papers/w17766. (accessed 4 October 2018).

[24] Gayer and Viscusi Supra note 19.

[25] Traci Mann et al., "Medicare's Search for Effective Obesity Treatments: Diets Are Not the Answer," (April 2007) *The American Psychologist* 62, no. 3: 220–233; Jerome P. Kassirer and Marcia Angell, "Editorial: Losing Weight--an Ill-Fated New Year's Resolution" (January 1, 1998) *The New England Journal of Medicine* 338, no. 1: 52–54.

Figure 3: Regulators Wrongly Assume Bias



The primary disadvantage of cost increasing behavioral regulation is that it makes consumer choices more expensive. This may not be particularly important in the first scenario above, when the regulation successfully counters consumer bias and leads consumers to pick a less costly option. Yet, if regulators misdiagnose the underlying bias, the regulation may lead consumers toward an even more expensive option than the one they choose without regulation.

Consequently, this approach is sensitive to the regulator error. Wrong assumption on the part of regulators can make consumers worse off. More importantly, the approach is inflexible and cannot accommodate consumer heterogeneity. The approach assumes that all consumers make the same error due to the same bias. Yet in case of heterogeneity of consumer errors, cost increasing behavioral regulation helps consumers whose biases fall under the first scenario but hurts consumers in the second and third scenarios.

For example, consumers may opt for less efficient appliances for a variety of reasons. Some consumers may undervalue future energy savings due to present bias. For these consumers, the energy efficiency standard offers considerable savings. However, if consumers are too present biased, they will balk at the higher upfront sticker price of a more efficient appliance. Consequently, they will postpone the purchase and continue using an older less efficient appliance. Alternatively, if consumers opt for a less efficient appliance because they value other features that are unavailable on more efficient

models, the standard will make consumers worse off by forcing them to purchase a less desirable appliance.

3.2 Targeting Consumer Bias

In contrast, the second approach relies on targeting consumer bias in order to reduce the costs imposed by that bias on the optimal choice. The policies aim to help consumers to perceive the true cost of the choices (as in figure 1.a) or at least reduce the costs imposed by consumer biases enough to alter consumers' decisions.

There are a number of tools available to policymakers in order to reduce the cognitive demand of decision-making.[26] One way to help consumers select the best option is to make it easier to choose. In many cases, selecting the optimal choice requires consumers to expend considerable cognitive resources or willpower. Simplifying the process will reduce the cognitive costs associated with the choice. For example, many eligible low-income high school students fail to apply for federal scholarship and consequently fail to enroll in college.[27] However, field studies show that simplifying the application process can considerably increase the enrollment numbers among these students.[28]

Another example of reducing the cognitive costs of a decision is an energy efficiency label, which can serve as an alternative to standards. For example, the EnergyGuide label, which most types of appliances have to display, provides consumers an estimated annual operating

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[26] see Abdukadirov, King, and Wille, *Taking Paternalism Out of Nudge*; Lashawn Richburg-Hayes et al., *Behavioral Economics and Social Policy: Designing Innovative Solutions for Programs Supported by the Administration for Children and Families*, Office of Planning, Research and Evaluation Report No. 2014-16a (Washington, DC, April 2014), Washington, DC, available at https://files.eric.ed.gov/fulltext/ED546643.pdf (accessed 04 October 2018)

[27] Jacqueline E. King, *Missed Opportunities: Students Who Do Not Apply for Financial Aid*, American Council on Education Issue Brief (Washington, DC, October 2004), Washington, DC, available at http://www.acenet.edu/news-room/Documents/IssueBrief-2004-Missed-Opportunities-Students-Who-Do-Not-Apply-for-Financial-Aid.pdf.(accessed 04 October 2018)

[28] Eric P. Bettinger et al., "The Role of Application Assistance and Information in College Decisions: Results from the H&R Block FAFSA Experiment," (August 2012) *Quarterly Journal of Economics* 127, no. 3: 1205–1242.

cost as well as its estimated annual energy consumption of an appliance.[29] Since all appliances within the category have to display the EnergyGuide label, it provides an easy way to compare the relative energy efficiency and potential energy savings from each appliance. To further aid the comparison, the label places the annual operating cost along the range of operating costs for similar models.[30] Thus, consumers can get an idea of how the operating costs for a particular appliance stack up against similar appliances by simply looking at a single label.

The label reduces the cognitive demands of choosing a more efficient appliance in two ways. First, it reminds consumers to consider energy costs in addition to other appliance characteristics. Second, it reduces the cost of incorporating energy efficiency into consumers' calculations by providing the appliance's estimated operating costs. Studies show that the label is successful in countering consumers' high discount rates and increasing their willingness to pay for more efficient appliances.[31]

Another way to reduce consumers' present bias in energy efficiency is to harness the power of social norms. For example, the energy analytics company Opower provides feedback to utility customers on their energy use through the Home Energy Report included with the monthly utility bill.[32] The distinct feature of the report is that it not

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[29] Jennifer Thorne and Christine Egan, *An Evaluation of the Federal Trade Commission's EnergyGuide Appliance Label: Final Report and Recommendations*, American Council for an Energy-Efficient Economy Research Report A021 (Washington, DC, August 1, 2002), Washington, DC.

[30] Lucas W. Davis and Gilbert E. Metcalf, *Does Better Information Lead to Better Choices? Evidence from Energy-Efficiency Labels*, National Bureau of Economic Research Working Paper 20720 (Cambridge, MA, November 2014), Cambridge, MA, available at http://www.nber.org/papers/w20720 last accessed on (accessed 04 October 2018)

[31] Richard G. Newell and Juha V. Siikamäki, *Nudging Energy Efficiency Behavior: The Role of Information Labels*, National Bureau of Economic Research Working Paper 19224 (Cambridge, MA, July 2013), Cambridge, MA, http://www.nber.org/papers/w19224; Davis and Metcalf, *Does Better Information Lead to Better Choices?*

[32] Hunt Allcott, "Social Norms and Energy Conservation," *Journal of Public Economics* 95, no. 9–10, Special Issue: The Role of Firms in Tax Systems (October 2011): 1082–1095.

only provides information on the household's energy consumption but also shows how the household's consumption stacks up against its neighbors. Behavioral research indicates that social comparisons (e.g. showing that the consumer's neighbors are energy-efficient) are effective in persuading consumers to reduce their energy consumption.[33] As a result, Opower's customers have reduced energy use by approximately 2 percent.[34] It would take an 11-20 percent short-run energy price increase in order to match this level of energy reduction.

Crucially, none of these tools restrict consumers' ability to proceed with their current choice C. It helps consumers in the first scenario but does not impose additional costs on consumers in the second and third scenarios. This approach offers policy makers the flexibility when dealing with heterogeneous consumers.

4.0 PAYDAY LENDING REGULATION

In recent years, payday loans came under increasing scrutiny due to concerns that payday lenders may be taking advantage of borrowers with few other credit options. Critics argue that many consumers fail to understand the full cost of payday loans or to fully consider their ability to repay loans at a later date.[35] As a consequence, some payday borrowers become trapped in perpetual debt.[36] Many consumers end up paying more in fees than the original loan amount.

In an influential paper, Elizabeth Warren and Oren Barr-Gill argue that consumer credit is a good as dangerous as physical products, like

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[33] P. Wesley Schultz et al., "The Constructive, Destructive, and Reconstructive Power of Social Norms," *Psychological Science* 18, no. 5 (May 1, 2007): 429–434; Allcott, "Social Norms and Energy Conservation."

[34] Allcott, "Social Norms and Energy Conservation"

[35] Elizabeth Warren, "Unsafe at Any Rate," *Democracy*, no. 5 (Summer 2007): 8–19; Jean Ann Fox and Edmund Mierzwinski, *Rent-a-Bank Payday Lending: How Banks Help Payday Lenders Evade State Consumer Protections* (Washington, DC, 2001), Washington, DC, http://www.consumerfed.org/pdfs/paydayreport.pdf (accessed 4 October 2018).

[36] Consumer Financial Protection Bureau, *Data Point: Payday Lending* (Washington, DC, March 2014), 10–12, Washington, DC, http://files.consumerfinance.gov/f/201403_cfpb_report_payday-lending.pdf (accessed 4 October 2018).

"toasters and lawnmowers, infant car seats, toys, meat and drugs," and ought to be regulated as such.[37] They propose the creation of a single regulatory body that would be responsible for evaluating the safety of consumer credit products and "policing any features that are designed to trick, trap, or otherwise fool the consumer who uses them." In fact, this proposal laid the foundation for the creation of CFPB a few years later.[38]

On March 26, 2015, CFPB announced its proposal to regulate short-term lenders, including payday lender, in order to protect consumers from falling into debt traps.[39]Given that the proposed regulation attempts to change consumer behavior, it is useful to examine its potential impact using the framework outlined in the previous section.

4.1 Background

A payday loan is a small, short-term loan. Most loans are made for two weeks and an average loan amount is $375.[40] Lenders usually charge $15 on every $100 advanced. In a typical payday loan, a borrower writes a postdated check for $300 in exchange for a $300 advance on his next payday.[41] After paying a $45 finance charge, the borrower immediately receives $255. The lender holds on to the postdated check until the following payday, at which point he deposits the check. Payday lending is widespread. With over 20,000 locations around the country, payday storefronts outnumber McDonalds and Starbucks

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37 Oren Bar-Gill and Elizabeth Warren, "Making Credit Safer," *University of Pennsylvania Law Review* 157, no. 1 (2008): 1–102.

38 In fact, Elizabeth Warren called for such agency in an earlier paper; see Warren, "Unsafe at Any Rate."

39 Consumer Financial Protection Bureau, "CFPB Considers Proposal to End Payday Debt Traps," *Consumer Financial Protection Bureau*, 3–26, 2015, http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/?utm_source=http://www.consumerfinance.gov&utm_medium=facebook (accessed 04 October 2018)

40 Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (Washington, DC, 2012), 6, Washington, DC, http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf. (accessed 04 October 2018)

41 Michael A. Stegman, "Payday Lending," *Journal of Economic Perspectives* 21, no. 1 (2007): 169.

stores combined.[42]In 2010, payday lenders extended over $40 billion in credit and generated $7.4 billion in revenues.

Consumers use payday loans to cover primarily recurring living expenses, although some loans are used for unexpected expenses.[43]About 5 percent of Americans report having borrowed from a payday lender in the past five years.[44] While the demographics of payday borrowers vary, most borrowers do not have a four-year college degree and have household incomes below $40,000. In addition, African-Americans are more likely to rely on payday loans as are divorced or separated consumers. In addition, renters are more likely to use payday loans than homeowners. According to 2012 National Financial Capability Study, 56 percent of Americans do not have sufficient funds set aside to cover expenses for three months in case of sickness, job loss, and economic downturn or in case of emergency.[45] More than half of Americans have subprime credit scores, meaning that they are unable to secure cheaper, mainstream sources of credit.[46]

Virtually all states already regulate payday lending. In 14 states and the District of Columbia regulations are so restrictive that there are effectively no payday storefronts operating within the state.[47] The

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42 Alex Kaufman, *Payday Lending Regulation*, FEDS Working Paper 2013-62 (Washington, DC, 2013), 4, Washington, DC, http://www.federalreserve.gov/pubs/feds/2013/201362/201362pap.pdf (accessed 4 October 2018).

43 See Pew Supra note 40 page 14

44 *ibid*. pp 8–11.

45 FINRA Investor Education Foundation, *Financial Capability in the United States: Report of Findings from the 2012 National Financial Capability Study* (Washington, DC, March 2013), 13, Washington, DC, available at http://www.usfinancialcapability.org/downloads/NFCS_2012_Report_Natl_Findings.pdf. last accessed on (accessed 04 October 2018)

46 Jennifer Brooks et al., *Excluded from the Financial Mainstream: How the Economic Recovery Is Bypassing Millions of Americans* (Washington, DC, n.d.), Washington, DC, available at https://wwweveryoneiswelcome.org/wp-content/uploads/2015/02/2015_Scorecard_Report.pdf (accessed 4 October 2018).

47 Pew Charitable Trusts, *State Payday Loan Regulation and Usage Rates* (Washington, DC, 2012), Washington, DC, available at http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/~/media/data%20visualizations/interactives/2014/state%20payday%20loan%20regulation%20and%20usage%20rates/report/state_payday_loan_regulation_and_usage_rates.pdf. (accessed 4 October 2018)

remaining states impose various restrictions on payday loan, including limits on maximum loan amount (ranging from $300 in California to $1,500 in Wisconsin), limits on fees and interest charged, and restrictions on length of loan terms.

4.2 Proposed CFPB Regulation

The CFPB proposal focuses primarily on the restricting lenders' ability to extend the types of loans that might result in a spiraling debt cycle for consumers. Thus, the CFPB's approach is to increase the cost of a "bad" choice. However, the proposal does not specify what it expects consumers to do instead of getting a payday loan.

The agency's website offers some clues as to what CFPB thinks is a better alternative to payday loans for consumers. CFPB offers two strategies for dealing with the need for a loan that might lead some consumers to payday lenders.[48] First, CFPB suggests looking into cheaper sources of credit, e.g. credit cards and pawns. Alternatively, consumers may borrow money from family and friends. Second, CFPB suggests finding ways to eliminate the need for the loan by for example negotiating with creditors to delay the payment due date. Finally, as a longer-term strategy, CFPB suggests saving money in order to have reserves for unexpected expenses. A consumer information webpage by the Federal Trade Commission (FTC) offers a similar advice but adds an option to trim spending in order to achieve a realistic budget.[49]

Consumer views on payday loans provide an interesting contrast to federal agencies' views. In a recent Pew survey, payday loan borrowers were asked what they would do if payday loans were unavailable.[50] Most respondents, 81 percent, said that they would cut their expenses. In addition, 62 percent said they would also consider

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[48] Consumer Financial Protection Bureau, "I Need Money Now. Should I Get a Payday Loan? What Other Options Should I Consider?" *Consumer Financial Protection Bureau*, 1–13, 2016, available at http://www.consumerfinance.gov/askcfpb/1583/i-need-money-now-should-i-get-payday-loan-what-other-options-should-i-consider.html. (accessed 4 October 2018).

[49] Federal Trade Commission, "Payday Loans," *Consumer Information*, March 2008, available at https://www.consumer.ftc.gov/articles/0097-payday-loans (accessed 4 October 2018).

[50] Pew Charitable Trusts, *Payday Lending in America*.

postponing some bill payments and 57 percent would try to borrow from family and friends. Only a minority of consumers would turn to alternative sources of credit. Thus, 44 percent of consumers said that they would turn to banks or credit unions for a personal loan and 37 percent would use credit cards. These responses indicate that the payday loan alternatives suggested by CFPB and FTC are in fact available to consumers. Yet, consumers clearly see payday loans as a superior choice.

However in Gregory Elliehausen's 2007 survey of payday loan borrowers, almost half consumers saw a payday loan as their only option.[51] Of consumers who did consider alternatives, about half would approach friends and family and about a third would consider a loan from a bank, a credit union or a finance company. Less than 3 percent would consider using credit cards. Note that in contrast to Pew survey, the Elliehausen study did not ask consumers how they would cope with the unavailability of payday lending. Instead, the study asked whether consumers have considered alternative sources prior to obtaining a payday loan. This may explain the differences between the two surveys on consumer views of alternatives to payday loans.
CFPB seems to believe that the correct behavior for consumers seeking payday loans is to secure a cheaper loan or to cut their spending and that behavioral biases may hinder consumers' ability to select these alternatives. In its proposal, CFPB does not discuss which behavioral biases it aims to correct with the regulation. There are several cognitive limitations that may account for consumers' failure to optimize their decision-making.

- **Heuristics.** To reduce the cognitive demands of decision-making, consumers often resort to heuristics to simplify the decision process.[52] Heuristics are mental shortcuts that allow consumers to reduce a complex decision-making task to a

[51] Gregory Elliehausen, *An Analysis of Consumers'use of Payday Loans* (Washington, DC, 2009), 39–40, Washington, DC, available at https://www.researchgate.net/publication/237554300_AN_ANALYSIS_OF_CONSUMERS'_USE_OF_PAYDAY_LOANS (accessed 04 October 2018)

[52] Herbert A. Simon, "Invariants of Human Behavior," (1990) *Annual Review of Psychology* 41: 1–19.

much simpler form of judgment. For example, an attribute substitution heuristic involves individuals replacing a complex question with a related one that they can readily answer. In one study, when students were first asked to rate their satisfaction with life and then to recall the number of romantic dates they had in the past month, the correlation between answers was negligible.[53] However, when the order of questions was reversed, the answers became highly correlated. Thus, students substituted an answer to a simpler question – the number of dates – for an answer to a more complex question on life satisfaction.

Consumers may be using similar heuristics when evaluating the cost of a payday loan and may not realize the true cost of the loan. Fees charged on payday loans generally range between $15 and $30 on each $100 advanced, which appears to yield a maximum interest rate of 30 percent. However, this fee applies only to a single pay cycle. On an annual basis, the average interest rate of a payday loan is closer to 400%.[54] While payday loan applications do disclose the loan's APR, studies show that many consumers find APR confusing.[55] Consequently, consumers resorting to simplifying heuristics may focus on the single pay cycle fee and fail to realize the full cost of a payday loan.

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[53] Fritz Strack, Leonard L. Martin, and Norbert Schwarz, "Priming and Communication: Social Determinants of Information Use in Judgments of Life Satisfaction," (October 1, 1988) *European Journal of Social Psychology* 18, no. 5: 429–442.

[54] See Pew Supra note 50 p 6.

[55] Bureau of Consumer Financial Protection, "Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z)," *Federal Register* 77, no. 164 (8–23, 2012): 51116–51457; James M. Lacko and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (Washington, DC: Bureau of Economics, Federal Trade Commission, 2007), available at https://www.ftc.gov/reports/improving-consumer-mortgage-disclosures-empirical-assessment-current-prototype-disclosure. (accessed 04 October 2018)

- **Satisficing.** Another strategy that consumers use to reduce the cognitive demands of decision-making is satisficing.[56] With this strategy, consumers stop searching for better solutions once they find a good-enough option. Typically, they quickly settle on a satisfactory choice and do not bother looking for more cost-beneficial alternatives. For example in a large survey of consumer behavior, William Brandt and George Day found that consumers were less deliberate with their credit decisions compared to decisions about major consumer product purchases.[57] The majority of consumers planned their purchases of household durables long in advance and shopped around to find better deals. Yet when consumers needed credit to finance major purchases, only a quarter of consumers sought out information about credit and only a fifth shopped around among different sources of credit. Most consumers simply relied on retail stores to arrange for credit. Thus, consumers satisficed and stopped searching for credit options once they found a good-enough option.

- **Tunneling.** When faced with a sudden need for funds, some consumers focus so narrowly on solving the problem at hand—covering an immediate expense—that they overlook the greater problems caused by taking out a high interest payday loan.[58] The benefits of a payday loan are immediate, while its costs are in the future. Thus, it may seem attractive to consumers who tunnel their vision to immediate problems. Yet, consumers may not consider their ability to repay the loan when it comes due. A CFPB study shows that four out five payday loans are rolled over or renewed and one out of five loans ends up costing consumers more in fees that the amount borrowed.[59]

- **Hassle factors.** While heuristics and satisficing focus on why payday loans may be an easy choice for consumers, hassle factors explain why it may be difficult for consumers to choose alternatives to payday loans. Hassle factors refer to various

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56 Simon, "Invariants of Human Behavior."

57 William K. Brandt and George S. Day, "Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending," (1973–1974) *University of Michigan Journal of Law Reform* 7: 297–328.

58 Mullainathan and Shafir, *Scarcity*, 105–111.

59 Consumer Financial Protection Bureau, *Payday Lending*.

features and requirements of a process that make it difficult for consumers to accomplish a task.[60] For example, a personal loan may provide consumers with a cheaper credit. However, an application for a personal loan requires consumers to provide a considerable amount of documentation and may take a few days to be approved. In contrast, most payday loans require only basic information and can be approved in minutes.[61] In fact, around 40 percent of consumers pointed to easy process and convenient location as the main reasons for choosing a payday loan over alternatives.[62]

Similarly, consumers may see negotiations with creditors to postpone payment due dates as a hassle. Negotiations may involve navigating through the creditor's automated phone system in order to reach the right person, lengthy waits for the next available representative, and the potentially unpleasant process of pleading one's case.[63]The creditor may require additional documents demonstrating the need for an extension as well as the ability to pay the debt at a later date. Consumers have to expend considerable effort while the favorable outcome is not assured.

- **Present-bias.** As the Pew survey indicates, most consumers could forgo the loan and cut the expenses instead. However, present bias may lead consumers to undervalue the future cost of a payday loan and overvalue the immediate cost of curtailed spending. Consequently, present-biased consumers may find it difficult to stick to a limited budget.

In line with CFPB's assumptions, consumers can follow two strategies to avoid a payday loan: reduce spending or get cheaper credit. The

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60 Lashawn Richburg-Hayes et al., *Behavioral Economics and Social Policy*

61 See e.g. Advance America, "Frequently Asked Questions," *Advance America*, n.d., available at https://www.advanceamerica.net/questions. (accessed 4 October 2018).

62 Elliehausen, Supra note 51P. 40

63 See e.g. Credit.com, "10 Tips for Negotiating with Creditors," 10–3, 2013, https://www.credit.com/debt/ten-tips-for-negotiating-with-creditors/; Don Rafner, "How to Negotiate Late Payments with Mortgage Lenders," *Global Post*, n.d., available at http://everydaylife.globalpost.com/negotiate-late-payments-mortgage-lenders-14640.html. (accessed 04 October 2018).

type of expenditure that is financed through a payday loan determines which of these alternatives makes the most sense. In case of non-essential spending – expenses that could reasonably be postponed until consumers have the finances to cover them – the rational response would be to cut spending. In case of essential spending, the rational response would be to secure a cheaper loan. Essential spending includes genuine emergencies such as unexpected medical expenses or auto repairs and major recurring expenses such as rent or utilities.

According to the scenarios described previously, there are three ways in which a regulation restricting payday lending can impact consumers. In the first instance, the regulation may in fact help consumers make a better choice and leave them better off. As Pew survey indicates, 69 percent of payday loans are used to cover recurring expenses and another 8 percent are used to cover relatively frivolous expenses.[64] Similarly, at least a quarter of respondents in the Elliehausen study, said that the expense covered by their most recent payday loan could have been postponed.[65] Furthermore, 81 percent of consumers would respond to restrictions on payday lending by cutting expenses.[66] Consequently, a substantial portion of expenditures financed through payday loans may be readily cut or postponed. If consumers are driven to spend by present-bias or tunneling, CFPB regulation may prompt them to create a more realistic budget and stick with it.

Yet as Pew survey indicates, 16 percent of payday loans are used to cover urgent or emergency expenses.[67] In the Elliehausen study, the rate of using the most recent payday loan to cover an unexpected urgent expenditure is even higher at 71 percent.[68] And even the recurring expenses are not necessarily frivolous – a substantial portion is used to cover such necessities as rent or mortgage payments as well as food. Simply cutting spending may not be an option for many consumers.

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64 Pew Charitable Trust, Supra note 50. p.14

65 Elliehausen, Supra note 51.p.35

66 Pew Charitable Trust, Supra note 50.p.16

67 *Ibid*., 14.

68 Elliehausen, Supra note 51.p.35

CFPB assumes that the optimal choice for consumers to cover essential expenses would be to find a cheaper source of credit. According to Pew survey, many consumers would in fact turn to cheaper credit alternatives if payday loans were unavailable. About 44 percent would turn to bank loans and 37 percent would turn to credit cards. The numbers in the Elliehausen study are comparable but somewhat lower with about a third of consumers turning to banks and only 3 percent turning to credit cards. Consequently, CFPB regulation could help these consumers by nudging them toward cheaper credit.

Now consider a case when regulators underestimate consumer bias. Thus, consumers face a non-essential spending but are too present-biased to simply cut spending. Alternatively, consumers need money for essential expenditure but are too biased to turn to cheaper alternatives to payday loans. For example, hassle factors associated with negotiating later payment dates with creditors may be too high. In addition, consumers may rely on heuristics in searching for alternative credit sources. In the Elliehausen study, almost 60% of respondents considered applying for credit but chose not to apply because they expected to be rejected.[69] While this belief is driven by past experiences, it is possible that some payday consumers underestimate their eligibility for credit.

In this case, consumers will still attempt to finance their purchase. But the restrictions on payday lending may push them to use pawnshops or overdrafts. In Pew survey, 57 percent of respondents would consider selling or pawning possessions.[70] While the rates charged by pawnshops are typically lower than payday loans, consumers risk losing their pawned possessions if they fail to pay back the loan (about 20 percent of consumers default on their pawn).[71]Since pawnshop loans are only a small fraction of the value of collateral, consumers who lose their possessions end up paying a far higher charge for the

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69 *Ibid*., 33.

70 Pew Charitable Trust, Supra note 50. P.16

71 Marieke Bos, Susan Carter, and Paige Marta Skiba, *The Pawn Industry and Its Customers: The United States and Europe*, Vanderbilt Law and Economics Research Paper No. 12-26 (Nashville, TN, September 20, 2012), Nashville, TN, http://papers.ssrn.com/abstract=2149575. (accessed 04 October 2018).

loan.[72] Similarly, Morgan, Strain and Seblani find that restrictions on payday lending increase the frequency of overdrafts.[73] Yet, an average overdraft fee of $35 could be higher than the payday loan charges, especially on smaller loans.[74]

Alternatively, consumers may be facing essential expenditures but may not have access to cheaper credit. Almost 46 percent of consumers do not have credit cards and 40 percent of consumers with credit cards have already reached the credit limit.[75] Almost a third of consumers have high levels of debt that would preclude them from qualifying for a bank loan or a credit card.[76] There are several ways such consumers may respond to restricted access to payday loans. First, they may turn to a potentially more expensive source of credit, such as pawnshops or overdraft described earlier. Second, consumers may delay some of the bill payments. In a Pew survey, 62 percent of consumers indicated they would consider such strategy to cope with unavailability of payday loans.[77] Delaying bill payments maybe a rational strategy if such delays are negotiated with creditors. However, if consumers simply do not pay on time, they may incur substantial late fees and damage to their credit history.[78] Third, consumers may delay the essential expenditure. Again, this may be a rational choice in some circumstances. However, if consumers delay a car repair or a medical

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72 Howard Jacob Karger, "Scamming the Poor," *The Social Policy Journal* 3, no. 1 (February 20, 2004): 39–54.

73 Donald P. Morgan, Michael R. Strain, and Ihab Seblani, "How Payday Credit Access Affects Overdrafts and Other Outcomes," *Journal of Money, Credit and Banking* 44, no. 2–3 (March 1, 2012): 519–531.

74 PEW Center on the States, *Overdraft America: Confusion and Concerns about Bank Practices* (Washington, DC, n.d.), Washington, DC, available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/SCIBOverdraft20America1pdf.pdf (accessed 04 October 2018).

75 Elliehausen, Supra note 51.p. 39

76 *Ibid*., 32.

77 PEW Center on the States, *Overdraft America*, 16

78 Gregory Elliehausen and Edward C. Lawrence, *Payday Advance Credit in America: An Analysis of Customer Demand*, Credit Research Center Monograph #35 (Washington, DC, 2001), 13–14, Washington, DC, available at http://cfsaa.com/Portals/0/analysis_customer_demand.pdf (accessed 4 October 2018).

treatment, the cost of such delay may be higher than the cost of a payday loan.[79]

Given the wide variety of circumstances under which consumers resort to payday loans, CFPB regulation restricting payday lending will impact consumers differently. The regulation will help some consumers to either limit non-essential spending or find cheaper sources of credit for cover essential expenditures. On the other hand, the regulation will push some consumers toward riskier and costlier lines of credit. Alternatively, consumer may either delay necessary spending or delay paying their bills. In the latter scenarios, consumers will be worse off under the restrictive regulation.

5.0 ALTERNATIVES TO CFPB REGULATION

Instead of restricting payday loans, CFPB can target consumer biases directly through smarter disclosures. The agency can apply the lessons from the fuel economy label, which is issued jointly by the Department of Transportation and the Environmental Protection Agency and is mandatory for all vehicles, and FTC's EnergyGuide label, which is required for most appliances. Both labels address the so-called Energy Paradox, which refers to the low rate of consumer adoption of energy saving technologies.[80] While long-term cost savings make it cost-beneficial for most consumers to purchase a more expensive but more efficient vehicle or appliance, few consumers choose to do so. Thus, the federal agencies strategically use disclosures on these labels to target various consumer biases and help consumer make a more cost-beneficial choice.[81]

The first strategy is to reduce search costs. Consumers can usually get a better deal if they shop around. However, the cost of search for a

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[79] *ibid*., 15.

[80] Adam B. Jaffe and Robert N. Stavins, "The Energy Paradox and the Diffusion of Conservation Technology," (May 1994) *Resource and Energy Economics* 16, no. 2: 91–122.

[81] Richard P. Larrick, Jack B. Soll, and Ralph L. Keeney, "Designing Better Energy Metrics for Consumers," (2015) *Behavioral Science & Policy* 1, no. 1: 63–76; W. Kip Viscusi and Ted Gayer, "Behavioral Public Choice: The Behavioral Paradox of Government Policy,"(Summer 2015) *Harvard Journal of Law & Public Policy* 38, no. 3: 973–1007; Newell and Siikamäki, *Nudging Energy Efficiency Behavior*.

better deal may deter some consumers. To counter this bias, the fuel economy label provides consumers with a vehicle's rating on a 1 to 10 scale, which compares the vehicle's fuel economy to other vehicles in its class. Similarly, the EnergyGuide label shows an appliance's operating costs along the range of operating costs for similar appliances.

Under this strategy, payday lenders could be required to disclose their charges along with the range for the lowest and highest payday loan charges within the state or county. Such disclosure would tell consumers that better terms for a payday loan might be available elsewhere and might encourage them to shop around for a cheaper payday loan. It would also pressure payday lenders to lower their fees. A more extensive version of this approach could require payday lenders to disclose the loan's APR along with the APR for a typical personal loan or a credit card. Such comparison would inform consumers of alternatives to payday loans. Since personal loans and credit card purchases are typically cheaper than payday loans, the disclosure might incentivize some consumers to opt for such alternatives. By providing a direct comparison of payday loans to alternative source of credit, it might help consumers who rely on simplifying heuristics or satisficing.

The second strategy is to reduce calculation costs. Consumers often fail to account for future costs of their choices if doing so requires additional data or calculations. In addition, consumers may ignore future costs because they are not salient at the time of purchase. To counter these biases, the fuel economy label provides consumers with a vehicle's estimated annual cost of fuel.[82] In addition, it provides consumers with an estimate of how much more they will spend or save over the following 5 years with the given vehicle compared to an average new vehicle. These disclosures remind consumers to consider the future energy costs when purchasing a new vehicle. In addition, the estimated operating costs make it easier for consumers to understand the true cost of owning a given vehicle.

Similarly, payday lenders could be required to disclose the full costs of a typical payday loan. Such disclosure would show how many times a

[82] *ibid*, 986

typical payday loan gets renewed or rolled over. It would also show the total amount that consumers end up paying the lenders by the time they pay off their loan. The disclosure might help consumers who are present-biased or tunneling to recognize the future costs of a payday loan. Consequently, it might incentivize consumers to consider alternatives to payday loans, such as reducing spending or negotiating payment plans with creditors. In addition by providing a more realistic estimate of a payday loan's costs, the disclosure might help consumers who rely on simplifying heuristics for the estimates.

Beyond disclosures, CFPB could launch educational programs that inform consumers of the true cost of a typical payday loan. In addition, the agency could use social comparisons, which can be effective in changing consumers' behavior. For example, Opower's Home Energy Report, described earlier, nudges consumers to save energy by comparing their energy consumption to that of their neighbors. Similarly, educational programs may emphasize the number of consumers in the neighborhood who choose alternatives to payday loans.

6.0 POLICY IMPLICATIONS

The growing concerns over the impact of biased decision-making on consumers have led CFPB to restrict certain types of consumer finance products or to demand more information disclosure. Despite their best intentions, such regulation may not result in better outcomes for consumers, especially when regulators misunderstand the reasons for consumer behavior. While regulations may help some consumers avoid costly mistakes, they may also leave some consumers worse off.

7.0 CONCLUSION

This paper highlights the importance of accounting for the regulator error and consumer heterogeneity when developing behavioral regulations. What appears to be a straightforward case of consumers' biased decision-making may in fact be a rational choice under the given circumstances. This does not necessarily mean that the problem does not exist. It merely points to the fact that the problem is not behavioral and thus requires a different sort of solution. Alternatively, the suboptimal outcome may result from a different behavioral bias.

Thus, a behavioral regulation targeting a single bias may not be effective. But the issue at stake goes beyond the limited effectiveness of behavioral regulations. Regulations restricting consumer choices may end up hurting consumers and the costs imposed by these regulations may exceed the costs of biased choices.

An alternative approach is to target consumer biases. Instead of restricting consumer choices, this approach focuses on reducing the cognitive demands of decision-making. Potential tools in this approach include simplifying the process, providing timely feedback or reminders, and using social norms. The main advantage of this approach is that it does not impose additional costs on consumers. If regulators misdiagnose the underlying problem, consumers will simply ignore the cost-reducing behavioral regulations. This is especially useful when dealing with heterogeneous consumer errors. Policymakers can combine different behavioral regulations each targeting a different potential bias. The regulations will help the consumers who exhibit the targeted bias but will not affect the remaining consumers.

Considering the potential unintended consequences of behavioral regulations is particularly important for CFPB. Consumer finance regulations often attempt to help low-income consumers avoid costly mistakes resulting from biased decision-making. However, the regulator error can have equally large negative impact on these consumers. When behavioral regulations restrict or impose higher costs on consumer choices, they may drive consumers towards even more expensive alternatives or deprive them of vital financial services.

For example, a CFPB regulation restricting payday lending may help some consumers by nudging them to look for cheaper loans, such as personal loans or credit cards. However, it may also push some consumers toward riskier loans. Alternatively, some consumers may choose to forego taking out a loan altogether even if it is necessary to cover an emergency expense. In the latter cases, the regulation would leave consumers worse off.

In contrast to restrictive regulation, CFPB can pursue policies explicitly targeting consumer biases. For example, the agency could use educational campaigns and disclosures to inform consumers of the true costs of a payday loan to counter consumers' present bias. In addition, CFPB could use disclosures to inform consumers about the true costs of a payday loan and about availability of cheaper credit alternatives to reduce the search costs and cognitive costs of comparing different loans. These alternative help those consumers whose poor decisions were driven by behavioral biases but do not restrict choices for the others. Given the high costs of the regulator error in policies affecting low-income consumers, such non-restrictive bias-targeting policies may provide a better approach for CFPB to fulfill its mission.

The United Kingdom's Doctrine of Parliamentary Sovereignty and the Rule of Law: How Right Was Albert Dicey?

Omotayo Akorede Samuel*

ABSTRACT

There is a growing presumption that the Diceyan orthodoxy of the supremacy of the United Kingdom's (UK) Parliament is gradually giving way to the rule of law. This Diceyan orthodoxy that the Parliament enjoys unrivalled sovereignty has dominated the UK constitutional thinking until recently. In its classic form, as enunciated by Albert Dicey, parliamentary sovereignty holds that there are no 'fundamental' limits to the laws that the Parliament can pass. However, there are arguments that such notions no longer hold sway, following the integration of the European Communities Act of 1972 (ECA) and the incorporation of the European Convention on Human Rights 1951 into domestic legislation by the Human Rights Act 1998 (HRA). This paper shall present a critique of this position, viz-a-viz the recent vote for Brexit – with the result that the Parliament's sovereignty is now a matter of principle.

1.0 INTRODUCTION

The Diceyan orthodoxy that the Parliament enjoys unrivalled sovereignty has dominated the UK constitutional thinking until recently.[1] In its classic form, as enunciated by Albert Dicey, Parliamentary Sovereignty holds that there are no 'fundamental' limits to the laws that the Parliament can pass.[2] However, there are those who believes that such notions no longer hold sway. It is argued that since the European integration through the European Communities Act of 1972 (ECA) and the incorporation of the European Convention on Human Rights 1951 into domestic legislation by the Human Rights

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1 Vernon Bogdanor, *The New British Constitution* (OUP 2009) 12.

2 Albert V Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan 1959) 34, 35.

Act 1998 (HRA), the doctrine of Parliamentary Sovereignty appeared to have slowly given way to the incoming tide of a new and emerging constitutional principle, the 'rule of law.'[3]

To achieve a comprehensive analysis of this discourse, it is imperative to define the concepts Parliamentary Sovereignty and Rule of Law and their place in the UK constitutional set up; especially, whether the primacy of the former has been limited (if at all it has), giving rise to the latter, in the wake of the incorporation of the ECA 1972 and HRA 1998 into the UK's constitution. The importance of this paper cannot be over-emphasised. Neo-Diceyans such as Jeffrey Goldsworthy, particularly as a matter of strict legal theory, argues that Parliamentary sovereignty's status quo is still intact; since all of the implementing legislation explicitly preserves Parliament's ultimate legislative competence.[4] Whether these notions are plausible will be the subject matter of this paper.

2.0 THE UK CONSTITUTIONAL SET-UP

It is axiomatic to hold that the UK constitution is unwritten or partially written.[5] However, this may be misleading. Professor Eric Barendt rightly argues that many constitutional conventions and principles are well expressed in written and published statements of constitutional experts and authoritative books by legal academics.[6] Nevertheless, Stephen Sedley notes that it (UK's constitution) is largely uncodified, that is, not written/found in a single document.[7] Hence, its basic principles such as Parliamentary Sovereignty, Rule of Law and Separation of Power are essentially *common law* constitution, in the

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3 S Sedley, "Human Rights: a twenty-first century agenda" in *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 351.

4 Michael Gordon, "The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade" [July 2009] PL 501.

5 Sir W Ivor Jennings, *The Law and the Constitution* (5th edn, London: University of London Press 1959) 36.

6 Eric Barendt and Evely Ellis, "Constitutional Fundamentals" in Professor David Feldman (ed) *English Public Law* (OUP: New York, 2004) 7.

7 Stephen Sedley, "The Common Law and the Constitution" in Lord Nolan and Sir S Sedley (eds) *The Making and Remaking of the British Constitution* (London: Blackstone 1997) 24ff: Contrast with other common law jurisdictions with codified constitutions – e.g. Nigerian Constitution 1999 (as amended), The US Constitution (as amended)

sense that they are expressed in judicial decisions rather than a codified statutory constitution.[8] These makes the concepts, Parliamentary sovereignty and rule of law, particularly elusive.

2.1 What is Parliamentary Sovereignty?

A traditional starting point for an analysis of parliamentary sovereignty is on Albert Dicey. However, it is important to note according to Goldsworthy, that the doctrine of parliamentary sovereignty does not owe its origin to Albert Dicey. Rather, it draws its influence from the Revolution of 1688 which gave rise to the British Bill of Rights 1688.[9] Nevertheless, it was Dicey who gave it its logical form. Dicey's conception that the Parliament (Queen, Houses of Lords and Commons) is sovereign, is summarized into three basic statements by John Alder; namely,

- The Parliament can make or unmake any law.
- Laws made by the Parliament cannot be challenged by any 'body.'
- Parliament cannot be bound by its predecessors neither can it bind its successors.[10]

Accordingly, in a spate of cases over the century, judges are wont to assert the supremacy of the Parliament over and above all other constitutional principles. Ungoed-Thomas J's comments in *Chenney*[11] reflects the first notion that Parliament could pass any law and it is not for the court to say that it is illegal. In *Hammersmith,* Lord Donaldson asserts the second position, that is, that the Parliament has limitless power to add to or alter a law.[12] *A fortiori*, in relation to statutes, the only duty of the court is to interpret and apply them.

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8 *ibid*

9 Jeffery Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (OUP 2001) 9ff.

10 John Alder, *Constitutional and Administrative Law* (10th edn, Palgrave Macmillan 2015) 165 (emphasis added)

11 *Cheney* v *Conn* [1968] 1 All ER 779

12 *R v Sec of State for Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1AC 521, 562

Continually, Ian Mcleod understands the third point to mean that the Parliament may set aside or override its own legislation, either expressly or impliedly,[13] *per Vauxhall.*[14] Express repeal is when the Parliament revokes an Act strictly and implied repeal occurs, when a latter statute which is inconsistent with an earlier one is concluded by the courts to cancel out the earlier one.[15]

3.0 IS THE PARLIAMENT STILL SOVEREIGN?

However, there are plausible reasons to argue that the doctrine of parliamentary sovereignty is now a mere text-book analysis, which is gradually losing taste. Jerry Jowell notes two possible justification for this assumption. 'The first relates to its *legitimacy*, that is, that Parliament will not pass a law that will be inimical to those it represents, and the second, to the *current hypothesis of constitutionalism'*;[14] and it is against this backdrop that the doctrine of the rule of law establishes its emergence.

3.1 What is the rule of law?

The concept of the rule of law is itself an elusive concept. However, like Parliamentary sovereignty, it owes its modern formulation to Albert Dicey. In its classic form, Coke CJ in his obiter in the *Bonham's*[17] case said that 'when an Act of Parliament is against Common right… or repugnant… The common law will control it and ajudge such act to be void.'[18] It is therefore not surprising that early writers such as Thomas Fuller, Jennings and consequently Dicey, took a cue from this. Dicey's conception of the rule of law is summarized into three distinct conceptions by Arndt.

- No man is punishable except for a distinct breach of law.
- Every man, whatever is rank is subject to the ordinary laws of the land.

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13 Ian Mcleod, *Legal Method* (8th edn, Palgrave Macmillan 2011) 56.
14 *Vauxhall Estates Ltd v Liverpool Corp* [1932] 1 KB 733
15 Supra note 13 (p. 56).
14 Jerry Jowell, "Parliamentary Sovereignty under the new constitutional hypothesis" [2006] PL 562, 572.
17 (1610) 8 Co Rep 114.
18 *ibid* 118.

- General principles of British constitution are the result of judicial decision in particular cases. [15]

A consistent criticism of these views is that it is not representative of current realities. G Zellick for instance argues that the notion of equal judgement before the law is flawed since the Crown, Parliamentarians and government officials retains special privileges before the law.[16] Furthermore, it is no news that the courts are no longer the harbinger of rights as the Parliament has the supreme right to curtail, through the Public Order Act 1986, and even confer those rights, *per* HRA 1998.

However, proponents of the substantive conception of the rule of law such as Allan and Dworkin claim that Dicey's Formal conception is restrictive[17] and have espoused the extended version which may be termed the 'principle of legality' (although with different approaches). This version of the 'rule of law' claims extravagantly, that legislations and government actions must be evaluated in light of common law values such as 'rights of access to courts,' 'fairness,' and control of arbitrary discretionary power.[18]

Accordingly, the decisions of *Chester*[19]and *Guardian Newspapers*[20] have demonstrated how judicial independence is now insulated from other branches of government by the rule of law. Lord Bingham also notes that the inclusion of the rule of law into a statute, s1 of the Constitution Reform Act 2005, for the first time is worthy of attention.[21]

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15 H W Arndt, "The Origins of Dicey"s Concept of the Rule of Law" [1957] 31 ALJ 117.

16 G Zellick, "Government beyond the law" [1985] PL 283.

17 Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

18 Supra note 10, p. 124, 132.

19 *Chester* v *Bateson* [1920] 1 KB 829.

20 *Sec of State for Defence* v *Guardian Newspapers Ltd* [1985] AC 339.

21 The RT Hon Lord Bingham of Cornhill, "The Rule of Law and the Sovereignty of the Parliament" (2008) 19 King's Law Journal 223

3.2 Why the rule of law is gaining ascendance?

The reasons for the ascendance of the rule of law is not far-fetched. In recent years, the courts have acquired legal rights to review Parliamentary legislation under the European Community Act 1972 (ECA), where they may dis-apply legislation in conflict of EU law, and under the HRA 1998, where the courts have the power to declare (though not invalidate) legislation incompatible with the European convention on Human Rights.[22] It is, therefore, opined that the Parliament has given up its sovereignty by incorporating both laws into domestic legislation thereby allowing for gradual supremacy of the rule of law.

Under the ECA, for instance, UK courts can directly apply and give effects to rights contained in the Treaty of Rome 1957 as incorporated into UK law through the ECA 1972 by the Parliament, without further enactments domestically (albeit, depending on whether it is a treaty, regulation, directive, decision or recommendations). [23] Hence, by virtue of Article 2 and 3 of the ECA, UK statutes are subject to EU laws and UK courts must interpret all EU laws in line with the decisions of the Court of Justice of the European Union (CJEU) respectively, *per Van Gen en Loos* case.[24]

Eo ipso, judges have stressed in cases such as *Siskina,*[25] *Factortame,*[26] *Thoburn,*[27] and more recently *HS2* (partially)[28] that UK laws may and will be dis-applied if they are in conflict with Treaty rights. In *Factortame* for instance, the court had disapplied the Merchant Shipping Act 1988 as being in conflict with the ECA. Lord Bridge held in the case that it has always been clear that it is the duty of the courts to override national laws found to be in conflict with Community

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22 Supra note 16

23 Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, Cambridge 2007) 315.

24 *Van Gen en Loos* case 26/62 [1963] ECR 1.

25 *Siskina* [1974] AC 210, Lord Hailshman (262).

26 *R* v *Sec of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

27 *Thoburn v Sunderland City Council* [2002] 3 WLR 247.

28 *R (HS2 Action Alliance Ltd)* v *Sec of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

laws.[29] *Ipso facto*, the ECA has given the court more legal power to question Parliament's legislative competence.

4.0 HAS THE PARLIAMENT SURRENDERED ITS SOVEREIGNTY?

However, successive Lord Chancellors and judges such as Law Lord's Kilmuir, Gardiner, and Hoffman have denied that Parliament would surrender its sovereignty or that the ECA would be irreversible.[30] Lord Hoffman, in *R v Lyons*, states expressly that Parliament prevails over treaties. To him, 'the sovereign legislator in the UK is Parliament. If the Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not.[35] Lord Scarman is also reported to have argued that the ECA preserves the *de jure* sovereignty of the Parliament. To him, community law has the force of law because the Parliament say so.[31] The impetus for such assumptions is that powers conferred by member states remains with the states. Hence, the Parliament could decide to repeal the ECA if they so wish, so that Parliamentary sovereignty is still preserved.

4.1 Brexit and Parliamentary sovereignty

The advent of Britain's exit (Brexit) from the European Union makes this even more likely. It has been argued that, although the ECA is a constitutional statute, all that is needed, constitutionally, to trigger its demise, is a two-section Act allowing the government to notify the UK's intention to withdraw.[32] This was done with the enactment of the EU (Notification of Withdrawal) Act 2017. The Act gives effect to the result of the 2016 UK EU membership referendum held on 23 June in which 51.9% of voters chose to leave the EU and also directly follows the decision of the UK Supreme Court on 24 January 2017 in

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29 *Factortame* supra note 30; also quoted in, Paul Craig, De Burca, and Grainne, *EU Law, Text, Cases and Materials* (4th edn, OUP 2007) 367-368.

30 Barendt and Ellis (n 6) 68; see also House of Lords Debate Vol 322 Cols 195, 208. [35] *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976 (Lord Hoffman).

31 "The law of establishment in the European Economic community" [1973] 24 NILQ 61, 70, 72.

32 Piet Eeckhout, "The Emperor has no clothes: Brexit and the UK Constitution" in Benjamin Martill and Uta Staiger (eds.) *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press, London: 2018) p. 169

the judicial review case of *R (Miller)* v *Secretary of State for Exiting the European Union.*[33]

Following the notification to leave the EU, the Parliament also passed the European Union (Withdrawal Agreement) Bill 2017-19 and is the planned name of a future bill of the Parliament of the UK that proposes to enshrine any Withdrawal Agreement between the UK and the EU in domestic law. The Withdrawal Agreement is the subject of ongoing and future Brexit negotiations and won't be detailed until the negotiations are completed. The objectives of the Bill include, inter alia;

- Enshrine the Withdrawal Agreement between the UK and the EU in domestic law including any financial settlement and agreement on citizens' rights.
- Legislate the details of an implementation period.
- Allow for changes to EU law to be legally binding in the UK.
- Allow for Parliamentary scrutiny and oversight of the process via primary legislation instead of secondary legislation via the European Union (Withdrawal) Bill
- Amend the European Union (Withdrawal) Act 2018 to save the effect of the European Communities Act 1972 during the transition period

It is interesting to note that the Bill cuts off the source of European Union law in the UK by repealing the ECA 1972 and removing the competence of European Union institutions to legislate for the UK.[34] However, with UK's withdrawal due to take place in 2019, the 'divorce bill', as it is known, remains a short-term issue, and as such EU law continues to bind on UK courts.

4.2 The Human Rights Act 1998 and the rule of law

Indeed, it is also arguable that the HRA 1998, which incorporates the rights of European Convention on Human Rights 1951 into UK law,

[33] [2017] UKSC 5; [2017] 2 WLR 583

[34] See House of Commons Briefing Paper, *EU (Withdrawal Bill): The Charter, General Principles of EU Law, and "Francovich" damages.* By Arabella Lang, Vaughn Miller, and Jack Simson Caird, Briefing Paper 8140, 17 November 2017

has given more effect to the rule of law and has posed more threats to Parliamentary sovereignty in recent times than any other Act. By virtue of section 2, UK courts must interpret the rights in line with the decisions of the European Court on Human Rights (Strasbourg). This is reminiscent of the *Smith*[35] case, on prisoner voting, which was interpreted in line with the decision of Strasbourg in *Hirst.*[36] Continually, section 3 of the Act states that statutes must be read and given effect in a way which is compatible with convention rights. The decision of the House of Lords in the *Belmarsh* case, where the detention of foreigners by the government on the grounds of suspicion of terrorism was held incompatible with article 5 and 14 of HRA 1998, is replete of this. [37] Lord Bingham's assertion reflects how the rule of law is being crystalized by the HRA. In his words,

> It is of course true that the judges in this country are not elected and are not answerable to the Parliament… 'But the functions of the independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the *rule of law*.[38]

However, it is held that a declaration of incompatibility according to s 4 of the HRA preserves, rather than limits Parliamentary sovereignty, since it does not invalidate the Statute. Another consistent criticism is that the Human Rights Act has been tarnished.[39] Partly because, it is a succour for immigrants and EU members, who wield the Act as a cloak against the Supremacy of the UK laws. Hence, there have been calls to repeal the HRA.[40] Secretary of Justice, Michael Gove, has also announced to this effect, that the draft British Bill of Rights will be published by 2016;[41] although this is yet to see the light of the day.

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35 *Smith* v *Scott* [2007] CSIH 9; [2007] SCLR 268.

36 *Hirst* v *UK (No 2)* (2005) ECHR 681.

37 *A* v *Secretary of the State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

38 *ibid* para 42.

39 Dr Mark Elliot, "A damp squib in the long grass: the report of the Commission on a Bill of Rights" 2 EHRLR 2013, 137.

40 Alice Donald, "A Bill of Rights for the UK: *why the process matters?"* [2010] 5 EHRLR 459, 464.

41 John Hyde, "Gove confirms British bill of rights consultation next year" (Law society gazette 2 Dec, 2015) available at

Nevertheless, Dr Mark Elliot argues that in its published report in 2013, the commission on a Bill of Rights advanced very limited, inchoate proposals that are essentially superficial in nature.[42] Another criticism is that, there is still doubts about what the Bill will contain.[43] Some critics says it is just semantics; the Human Rights Act can only be replaced by another Human Rights Act. Ipso Facto, if the Bill of Rights would, at the very least possess an identical shape at all to the HRA, why bother with a cosmetic change from HRA to Bill of Rights? This has, however, caused some critics to argue that the Bill of Rights is nothing more than a political project to protect the sovereignty of the Parliament, rather than a step towards protecting the rule of law.

Regardless, it may be argued that the foregoing is evident that the HRA has brought about a change in the constitutional thinking of the UK. As established in *Quintavalle*,[44] contact with interpretations of EU legislations has accelerated the tendency of courts to interpret domestic legislations more broadly, thereby giving way to the supremacy of the rule of law. This is also evident in cases such as *Anisminic,*[45] *Jackson,*[46] *Nicklinson*[47] *and Evans*[50] which shows respectively, an increasing indifference by the judiciary towards the supremacy of the Parliament. Christopher Knight also opines that

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http://www.lawgazette.co.uk/law/gove-confirms-british-bill-of-rights-consultation-next-year/5052536.fullarticle (accessed 21 December 2015).

42 Dr Mark Elliot, "A damp squib in the long grass: the report of the Commission on a Bill of Rights" 2 EHLR 2013, 137-151.

43 Solicitors Journal, "Necessary? Practical? Workable? The impact of the British Bill of Rights" [*Solicitors Journal,* 3 November 2015] Available at http://www.solicitorsjournal.com/public/administrative-and-constitutional/24475/necessarypractical-workable-%E2%80%A8the-impact-british-bill (accessed 21 December 2015)

44 *R* v *S of S for Health ex p Quintavalle* [2003] 2 WLR 692.

45 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 2 WLR 163.

46 *Jackson v A-G* [2005] UKHL 56, [2005] 1 AC 262.

47 *Nicklinson v Ministry of Justice* [2014] UKSC 38, [2015] AC 657. 50 *R (Evans) v A-G* [2015] UKSC 21.

Evans is representative of an emergence of the rule of law signifying that Parliamentary sovereignty is gradually fading away.[48]

On this view, as Lord Hope reiterates in *Jackson,* Parliamentary sovereignty is no more than a political fact for which no pure legal authority can be constituted.[52] Indeed, the most fundamental norms of a legal system owe their existence partly to their being accepted as binding by the most senior officials- Judges, Legislatures etc.[49] and the process by which the rule of law gradually evolves through judicial comments is indicative of this revolution.

As such, commentators such as Stuart Lakin have argued that the courts are better suited to wield the supreme power.[50] To him, there is no need for the concept of sovereignty but rather that the ultimate competence should reside with the courts. However, an apparent pitfall of Lakin's argument is that a relieve of supreme power to the courts to adjudicate may give birth to a tyrannical judiciary; which will in itself be disadvantageous, seeing that the courts are the custodian of the people's rights. It was Jeffrey Goldsworthy who argued that the judicial power has been unnecessarily expanding at the expense of legislative and executive powers, and if this continues, judges will usurp authority.[51]

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[48] C J S Knight, "The Rule of Law, Parliamentary Sovereignty and the Ministerial Veto" [2015] LQR 547. [52] *Jackson v A-G* [2005] UKHL 56; [2006] 1 AC 262, 102; Elizabeth Giussani, *Constitutional and Administrative law* (1st edn, Sweet and Maxwell 2008) 121.

[49] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 5.

[50] Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" [2008] 28 (4) Oxford Journal of Legal Studies 709, 734.

[51] Professor Jeffrey Goldsworthy, "Losing Faith in Democracy: Why Judicial Supremacy is rising and what to do about it?" (Launch of Policy Exchange Judicial Power Project 19 March 2015) 1. Available at http://www.policyexchange.org.uk/modevents/item/losing-faith-in-democracy-why-judicial-supremacy-is-risingand-what-to-do-about-it (accessed 21 December 2015)

5.0 CONCLUDING REMARKS

It can be inferred from the foregoing that Parliamentary sovereignty has been modified, [52] at least because the ECA and HRA gives the court legal authority to qualify the legislative competence of the Parliament. The advent of Brexit will bring about the demise of the ECA and it also means that UK Parliament retains its sovereignty over its affairs – albeit foreseeably – if the UK finally withdraws from the EU in 2019. However, the unruly arm of the rule of law, through the HRA 1998, will continue to limit the effects of Parliamentary sovereignty in the UK, until it is repealed.

Nevertheless, Albert Dicey may be right after 'all. The rule of law may be a fine concept but to paraphrase Toulson LJ, 'fine words butter no parsnips.'[53] If it is still within the legislative competence of the UK Parliament to repeal the ECA and HRA, then in the meantime, the parsnips remain unbuttered.

This paper purports that in a constitutional democracy, official power must not be absolute but controlled and limited.[54] It is, thus, safe to conclude in the words of Sir John Laws that, "Parliament retains its sovereignty, at least for now, but may lose it 'in the tranquil development of the common law, with a gradual reordering of our constitutional priorities, to bring alive the nascent idea, that a democratic legislature cannot be above the law'[55]

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52 *Supra note* 52: Lord Hope (para 105), Baroness Hale (para 159)

53 *Guardian Newspaper* (Supra note 23); See also C J S Knight, "The Rule of Law, Parliamentary Sovereignty and the Ministerial Veto" [2015] LQR 547, 552.

54 Jerry Jowell, (Supra note 16)

55 Sir John Laws, "Illegality and the Problem of Jurisdiction" in Michael Supperstone and James Goudie (eds.) *Judicial Review* (2nd edn, London: Butterworths Law 1997) para 4.17.

Taxation and E-Commerce: The Interesting Business of Taxing Online Businesses in Nigeria

Ilamosi Ekenimoh*

ABSTRACT

'By 2020, brick and mortar retail spaces will be little more than showrooms.'[1] If your business isn't on the internet, then your business will be out of businesses.[2] 'The sooner we drop the 'e' out of 'e-commerce' and just call it commerce, the better.'[3] All of the above quotes mark the massive tech-revolution created by the internetworking of four computers to create the Internet. This essay seeks to examine in total the frame work that exists for the taxation of online businesses in Nigeria. The essay identifies the problems involved in taxing online businesses in Nigeria, defines the scope of online businesses and emphasizes the challenges all of them face in operation, registration and taxation, briefly discusses the existent laws in Nigeria on the subject matter, and finally proposes solutions to the aforementioned problems, and then some.

1.0 INTRODUCTION

Nigeria is fast embracing the world as a global village with more than half of the country's population- 101 million, registered as internet users within the country.[4] The resultant effect is that many day-to-day activities, including trade and commerce are now conducted via the internet.

Businesses that are established and conducted online, usually do not follow the traditional business models; many don't as a necessity require a license or registration to operate, thus effectively excluding them from the tax database (meaning they will not be taxed). Including them will cost the government a lot of time, and money, contrary to

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1 Eddie Machaalani& Mitchell Harper, Co-CEOs of BigCommerce.

2 Bill Gates, Founder- Microsoft.

3 Bob Willett, former President of Best Buy International and CIO of Best Buy

4 Daily Trust, 'Mobile Internet Users in Nigeria Hit 101.2 million' available online at http://www.dailytrust.com.ng/mobile-internet-users-in-nigeria-hit-101-2m-254953.html (accessed 15 August, 2018).

Adam Smiths' principle of *Effectiveness*[5] for taxation which posits that taxes be collected with the least amount of effort possible.

Taxation is largely presence/residence based, and many online businesses, depending on the perspective, either have no presence, or are multi-resident; touching more than one jurisdiction/territory. There is thus difficulty in identifying the state(s) or country(ies) with tax jurisdiction over electronically generated income. The resultant effect is the additional difficulty of the possibility of double taxation.

In the event that liability is to be imposed on online businesses for tax avoidance, and/or evasion, many of these businesses lack physical offices to be served notice of said liability, as they conduct business through virtual stores. It would thus be easy for online businesses to close-up-shop in order to avoid liability. If tax authorities attempted to still track such defaulters down, that would result in even more expenditure by government.

Assuming online retailers, vendors, and businesses can be effectively taxed, an even bigger problem arises from attempting to tax their consumers/customers for goods and services purchased. Is the burden to be imposed on the retailer? As a large majority of online businesses are small and independently run, the cost of compliance and tax collection alone for these small businesses could be enough of a deterrent to keep them from participating in the marketplace.[6]

If the burden is to be imposed on tax authorities, how will they track transactions? Seeing as there is usually no third party in online transactions except banks, the collaboration with whom might raise issues as to customer privacy and overregulation.

All of the above, coupled with the fact that Nigeria has no direct E-commerce taxation laws creates a very interesting situation. How,

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5 Adam Smith, An Inquiry into the Nature and Causes of Wealth of Nations [1776], available at http://www.earlymoderntexts.com/assets/pdfs (accessed 15 August, 2018).

6 See: "e-commerce and Taxation- Understanding the Difficulties" available at http://www.mfa.gov.tr/e-commerce-and-taxation_-understanding-the-difficulties.tr.mfa (accessed 15 August 2018).

then, can online businesses be taxed in Nigeria? This article seeks to answer that question.

2.0 FORGET OIL, DATA IS KING

On July 1st, 2018, the Ugandan parliament passed a bill allowing the government charge 200 Ugandan shillings ($0.05) per day, for the use of up to 60 mobile apps. While the human rights implications, and the socio-political effects of this law leave much to be desired, its economic significance cannot be ignored. Classified as a luxury item,[7] the social media tax generated an estimated 7 billion (local currency) in its first month,[8] and is projected to raise at least 720 billion annually.[9]

President Museveni's[10] idea however, is not an original one. In the late 1990s' Hungary was the first country in the world to propose a levy of 150 *Forints*[11] per gigabyte of traffic data, which would have generated an estimated $440 million in a year as tax revenue for the country.[12]In an oil-dependent country, surrounded by a world where oil is fast going out of style, with gradually dwindling prices and demand, it appears internet data (and all related businesses) is the new gold.

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7 'Uganda Social Media Tax Stays for Now' available at www.google.com.ng/amp/s/www.wired.com/story/uganda-social-media-tax-stays-for-now/amp (accessed 14 August 2018).

8 'Ugandan Government Collects 7 Billion in Social Media Tax' available at www.telecompaper.com/news/ugandan-government-collects-ugx-7-billion-in-social-media-tax-1253340 (accessed 14 August, 2018).

9 'President Museveni Responds to Feedback on Earlier Statements on The New Social Media and Mobile Money Taxes' available at www.yowerikmuseveni.com/blog/museveni/president-responds-feed-back-earlier-statement-new-social-media-and-mobile-money-taxes (accessed 14 August 2018).

10 President of Uganda.

11 Hungarian currency ($0.60).

12 S. Jegatheesan, *Taxing the Internet, is that feasible?* available at https://arxiv.org/pdf (accessed 14 August, 2018).

3.0 THE GAME OF NUMBERS

Nigeria currently boasts 84.3 million steady internet users,[13]and in recent statistics by Geopoll (the world's largest mobile survey platform), 66% of Nigeria's total population of 190million, buy items online every few months.[14] It is no surprise therefore, that Nigeria's e-commerce market; currently valued at $13billion (N 4.01 trillion), is set to quadruple its value to $50 billion (N15.45 trillion) in the next 10 years.[15]

The Nigerian e-commerce sector records an estimated 300,000 online orders each day, and in November 2016, online retail giant Konga processed a record 155,000 orders totalling N3.5 billion within that sales period. Newcomer Yudala also claimed to have witnessed huge traffic on the platform, stressing that within the first 12 hours of its Black Friday, it recorded a sales worth about N450 million.[16]

Also in 2016, two years after international payment platform Paypal, launched operations in Nigeria, the Country became its third largest mobile e-commerce market in the world, with transactions approximating $819million.

E-commerce grows at an estimated rate of 16.8 % annually, worldwide. In Africa, the e-commerce space records 25.8% growth annually – making it the fastest growing sector in the world.[17]The Nigerian National Bureau of Statistics projects that the e-commerce sector will

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[13] Internet users in Nigeria' available at www.statista.com/statistics/183849/internet-users-nigeria/ (accessed 14 August, 2018).

[14] Guardian, 'Nigeria Leads South Africa and Others in Online Shopping' available at https://guardian.ng/business-services/nigeria-leads-south-africa-others-in-online-shopping/ (accessed 14 August, 2018).

[15] This Day, 'Nigeria's E-commerce Market Value to Hit N15trillion in 10 Years' available at www.thisdaylive.com/index.php/2017/08/28/nigrias-e-commerce-market-value-to-hit-n15-45tn-in-10-years/ (accessed 14 August, 2018).

[16] *ibid*.

[17] 'Nigeria's 12 Billion E-Commerce Market' www.businessamlive.com/nigerias-12bn-e-commerce-market-seen-driver-growth-near-term/ (accessed 15 August, 2018).

contribute about 10%, of the projected N10 trillion to the nation's Gross Domestic Product (GDP) by the end of 2018 (1 trillion).[18]

If data is king, then according to the game of numbers, the Nigerian government sits idly and unknowingly on treasure fit for royalty.

4.0 WHAT IS AN ONLINE BUSINESS?

Online businesses include for the purpose of this essay, Internet Service Providers which is further classified into:

- Network Service Providers such as the Nigerian *Globacom* and South African *MTN*, and;
- Product/ Service Providers such as Facebook, Google, Amazon, Wikipedia, all of which provide tools and services which can be used with access to the internet.

In the second category we have Online Vendors and Retailers, which are subdivided into:

- Multinational Retail stores such as Amazon, Asos, Alibaba, AliExpress, Konga, who often host smaller businesses, and;
- Independent Retail Stores which include Amazon, Fashionova and other indigenous businesses on Instagram and Facebook who either create their own products, or sell products independently.

In the third category are E-gig-economy businesses[19]such as Uber Technologies Inc., AirBnB, Lyft, Taxify which, as the name implies allow individuals who own products (e.g. cars) to use them to provide a service. Such company offers on the company's behalf for/during a period most convenient for such individuals. Alle-commerce business above can however be fitted into 3 broad categories:[20]

- Business-to-Business (B2B): large businesses host smaller businesses.

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18 *ibid.*

19 Reuters, 'U.S Judge Says Uber Drivers Are Not Employees' available at https://www.reuters.com/article/us-uber-lawsuit/u-s-judge-says-uber-drivers-are-not-companys-employees-idUSKBN1HJ311 (accessed 15 August 2018).

20 See: A. Khurana, *Understanding the Different Types of e-Commerce Businesses* available at https://www.thebalancesmb.com/ecommerce-businesses-understanding-types-1141595 (accessed 15 August 2018).

- Business-to-Consumer (B2C): Businesses supply directly to consumers.
- Business-to-Consumer-to-Consumer (B2C2C): Businesses provide services to consumers through other consumers.

4.1 Taxing the Business

It is decidedly easier for online businesses to operate in various jurisdictions without remitting tax to some or all of said jurisdictions. This is because e-commerce presents a major challenge for tax administrations, given the often multi-jurisdictional nature of the transactions and the potential anonymity of the parties.[21] Accordingly, research shows that internet platforms/businesses pay very low corporate income taxes outside the U.S.[22]

The reasons for this are multifarious and multifaceted ranging from inadequate technological knowledge of tax officials, to outdated or inapplicable laws, to tax evasion and avoidance, to improper market regulation, to lacunas in data and databases.

It may be raised as a further objection to the taxation of e-commerce that companies with economic contacts in more than state run the risk of double taxation. To combat this problem countries have proactively enacted local legislation, and also act as signatories to various bilateral and Multi-lateral agreements and treaties being signed worldwide.

Nigeria currently has 13 Double taxation treaties[23] with The United Kingdom, The Netherlands, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, France, Mauritius, South- Korea and Italy.

The OECD since 2013 has been working on a Base Erosion and Profit Shifting (BEPS) plan, the first action of which is to 'address the tax

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[21] 'Introduction to Taxation of E-Commerce' available at https://www.out-law.com/page-7512 (accessed 14 August 2018).

[22] F. Bloch, 'Internet Taxation' available at http://bruegel.org/wp-content/uploads/2016/06/Internet-Taxation.pdf (accessed 15 August 2018).

[23] 'Improved Double Tax Arrangements in Nigeria: any reason for delay?' available at https://www2.deloitte.com/ng/en/pages/tax/articles/inside-tax-articles/improved-double-tax-arrangements-in-nigeria.html(accessed 15 August, 2018).

challenges in the digital economy'. A main result of the plan has been country-by-country reporting, forcing firms in signatory countries to disclose all profits they make in every country.[24] The OECD also boasts a Model Tax Convention on Income and on Capital, which recognizes the challenges countries face in taxing online businesses.

4.2 Taxing the Consumer

The purpose of imposing Value Added Tax is the levy consumption.[25] Based on Figures from the National Bureau of statistics, Nigeria generates as revenue from Value Added Tax, an average of N205 billion per quarter, which totals to N820 billion per year.[26]In the first quarter of 2018, the Nigerian government generated a total of N269.79 billion from Value Added Tax., excluding e-commerce sources.[27]

According to a recent survey, 46% of online buyers said they have never paid sales tax on an Internet purchase and 75% said they would buy less on the Internet if a sales tax were imposed.[28]The US Supreme court just last month[29] in *South Dakota* v *Wayfair*[30] allowed states to impose secondary tax obligations on online retailers, even where they

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24 Supra, F.Bloch; n 22 above.

25 'An Introduction to The Value Added Tax' available at https://www.uschamber.com/sites/default/files/legacy/issues/econtax/files/vat_paper_4_25_2010.pdf(accessed 15 August 2018).

26 Premium Times, 'Nigeria Generates N204.77 billion from VAT in 2017 first quarter – NBS' available at https://www.premiumtimesng.com/business/business-news/233959-nigeria-generates-n204-77-billion-from-vat-in-2017-first-quarter-nbs.html (accessed 15 August 2018).

27 'These Sectors Fetched Nigeria N269 billion VAT Revenue in Three Months' available at https://www.pulse.ng/bi/finance/these-sectors-fetched-nigeria-n269bn-vat-revenue-in-3-months-id8397322.html(accessed 15 August, 2018).

28 'Taxation of Electronic Commerce' available at http://people.ischool.berkeley.edu/~hal/Papers/etax.html (accessed 14 August, 2018).

29 July, 2018.

30 585 U.S._2018.

lack physical presence in a state, so far the company maintains the minimum contacts necessary to receive income from that state.[31]

4.3 Taxing the Intermediary

A common problem that confronts authorities in imposing tax on online businesses, is the quantum and method of taxing online business intermediaries. This problem is illustrated best by the Uber dilemma.

The Uber dilemma simply explained goes thus; Uber provides a taxi service to its users and can be taxed directly for those services which it provides. It however does not provide those services directly. Third parties(intermediaries), drive the cabs and answer orders, with their own resources(cars) in order to provide the promised end product(a car ride), to the consumer. These intermediaries are however regarded to be 'independent', and thus, their parent companies neither collect nor remit income taxes to tax authorities. Tax authorities therefore encounter problems in ascertaining how much income intermediaries generate, in order to tax/ validate their remitted tax. This occurs mainly because online businesses refuse to aid authorities in the collection of taxes, and so the authorities encounter problems. The cycle continues; wash, rinse and repeat.

Uber, and many businesses in the E-gig-economy (such as AirBnB, which provides hotel services through third parties) have denied being employers of these intermediaries (drivers) and claimingthem to be self-employed.[32] Tax authorities thus cannot impose collection duties on them, as they might for 'brick-and-mortar' businesses, because apart from the fact that their quantum of income is unascertainable except through extremely tedious means, they require information and co-operation from online businesses, which the businesses are not obliged to give, bringing the officers back to square one, and beginning the cycle over again.

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[31] 'How Wayfair Opens the Door to Taxing Internet Sales' available at https://blog.oup.com/2018/07/wayfair-quill-tax-internet-sales/ (accessed 14 August, 2018).

[32] The Guardian, 'Uber Loses Right to Classify Drivers as Self-Employed' available at https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status (accessed 15 August 2018).

In *Razak* v *Uber Technologies Inc.*[33] the U.S. District Court for the Eastern District of Pennsylvania, the court held, that they're not employees, contrary to an earlier decision UK holding intermediaries of Uber to be employees, and thus, by extension, allowing tax authorities to impose liability for collection and payment of withholding tax.[34]

Uber also faces liability for other unpaid taxes and levies. According to the Lagos state ministry of transportation, in 2018, Uber is expected to pay as much as N100, 000 for special taxi licenses to operate within the state, and have failed to obtain those licenses. The franchise is expected to pay an additional annual renewal fees of at least N30,000 after the first year's N100,000 per car, which translates to a total debt of N600 million ($1.9 million)the firm owes the Lagos state government.[35]

5.0 FRAMEWORK FOR TAXING ONLINE BUSINESSES IN NIGERIA

Section 9 of the Nigerian Companies Income Taxation Act (CITA) allows for the taxation of any profits accrued, derived from, brought into and received in Nigeria, in respect of any trade or business, irrespective of the time within which such business was carried on. It also allows for the taxation of any source of annual profit not mentioned in the earlier categories, and of any amount deemed to be income under the Act. The act defined goods and services to mean physical goods and services, deliverable only by persons. It therefore excludes online goods and services, which may or may not be physical. Section 3 of Personal Income Tax Act 2011 (PITA) allows for the taxation of the personal income of individuals from sources within or outside Nigeria, which are obtained from or in the course of trade.

Section 6 of PITA, subjects' profits derived from any business or trade carried on both locally and internationally, to taxation; with the

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[33] No. 2:16-cv-00573

[34] Supra, note 32.

[35] 'N600million Lagos State Government Penalty Threatens Uber's Stay in Nigeria' available at https://www.thecable.ng/n600m-lagos-penalty-threatens-ubers-stay-in-nigeria (accessed 15 August, 2018).

exclusion of any gains derived from the foreign operations with no fixed base locally. Section 7 PITA and section 13 of CITA, further provide for the tax assessment of a non-resident/non-Nigerian company only where the taxable entity has a fixed base for business purposes, does business through an authorized agent and operates a business (contract for surveys, deliveries, installation or construction) in Nigeria. Consequently, where non-resident/ foreign companies do not meet the above criteria, they are exempt from taxation.

Section 2 of the Value Added Tax (Amendment) Act 2007 provides that tax shall be charged and payable on the supply of all goods and services. This sole position seems redemptive, off all those attempts recorded. These laws apart from appearing to be very limited in scope and subject matter, solve very few problems of e-commerce the e-commerce industry.[36]

It is interesting to find out that the Nigerian Investment Promotion Commission in 2017 waived Companies Income Tax for emerging sectors in Nigeria, including the E-commerce Sector, for a period of 3-5 years.[37]This action is contrary to Section 10 of the Industrial Development and Income Tax Relief Act which provides relief upon application to the Minister strictly for a 3 year period, renewable by the President for a maximum period of 2 years.[38] It appears then that there might be one further problem of our body of laws, a lack of certainty of the law.

6.0 FRAMEWORK FOR TAXING ONLINE BUSINESSES IN OTHER JURISDICTIONS

Apart from having legislation similar to those aforementioned under the previous sub-heading, other jurisdictions have taken additional

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[36] E-Commerce Income tax regime in Nigeria' available at http://stillwaterslaw.com/newsletter/2015/05/e-commerce-income-tax-regime-in-nigeria/ (accessed 15 August, 2018).

[37] 'Taxing The Digital Economy' available at https://www.thestar.com.my/business/business-news/2017/09/19/taxing-the-digital-economy/ (accessed 15 August, 2018).

[38] 'Industrial Development Income Tax Relief Act' available at http://lawnigeria.com/LawsoftheFederation/INDUSTRIAL-DEVELOPMENT-%28INCOME-TAX-RELIEF%29-ACT.html (accessed 15 August, 2018).

steps to regulate the E-commerce industry. In Asia, it appears that emphasis is on taxing foreign e-commerce operating within the country; Malaysia plans on amending some of their extant tax laws, especially with regard to the Goods and Sales Tax, to collect taxes from foreign companies that offer digital services within the country.[39] Thailand, on the other hand, is proposing repealing the VAT exemption on imported goods worth less than 1,500 baht ($47), to enable them tax goods bought online from foreign states.[40]

Under the 2006 Vietnamese Tax Administration Law, every business or individual who earns over VND 100 million from trading activities, including those on social media operating as e-trading floors must register within the tax database, then declare and pay taxes.[41]

The OECD[42] in addressing the above problems considered first establishing new bases for determining the tax liability of a digital company in a foreign country, using criteria such as revenue, number of active users and the extent of the businesses' digital presence. It also considered subjecting digital businesses to a withholding tax, the same way it would apply to dividends and interest earned by a foreign company within that jurisdiction.[43]

In the European Union, European based e-commerce companies are required to pay a nationally levied sales tax on internet sales, and foreign companies are equally subject to EU tax law on downloadable goods. European countries such as Italy, Spain, Hungary, France, have made various efforts to develop specialised industry-based taxes, based on the number of users per platform, or the flow of

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39 Available online at https://www.ft.com/content/2fb53b78-f781-11e7-88f7-5465a6ce1a00 (accessed 15 August 2018).

40 *ibid.*

41 'Taxing Online Business: A Challenge' available at http://vietnamlawmagazine.vn/taxing-online-business-a-challenge-5807.html (accessed 15 August 2018).

42 Organisation for Economic Co-operation and Development.

43 S. Adu 'Taxation in the digital economy –How much will things change?' available at https://www.pwc.com/ng/en/assets/pdf/tax-watch-april-2016-tax-in-the-digital-economy.pdf (accessed15 August 2018).

downloaded/uploaded data, or the number of clicks on advertisements hosted by the platform.[44]

7.0 PROPOSED SOLUTIONS/ RECOMMENDATIONS

It is proposed that the following solutions maybe be implemented by the Nigerian Tax Authorities in order to effectively tax e- commerce within Nigeria.

As regards the law: First, that the corpus of Nigerian Tax law must be updated to bring it to par with international best practices and standards. Next, legislation mandating Online Businesses (Jumia, Uber, Instagram, etc.) to provide not only information as regards their income, but also related information as relates to the income information of their intermediaries, where available. Furthermore, where online businesses possess that above information, it is recommended that a statutorily imposed duty to collect withholding tax, be imposed on such businesses.[45] Finally, authorities should work on creating a specialized framework for the taxation of e-commerce.

Utilising Existing framework: Nigeria signed both the Multilateral Base Erosion Profit Shifting Convention and the CRS Multilateral Competent Authority Agreement to tackle international tax avoidance and evasion.[46] It is suggested that these existent framework be utilised to monitor the activities of Multi-national Online Businesses, to prevent tax evasion and avoidance, alongside the Global Forum's (EOIR)[47] and the OECD's AEOI standard, both of which allow for the exchange of information.[48]

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44 Supra, F. Bloch, note 22 above.

45 As in Sections 69 – 73 of the Personal Income Tax (Amendment) Act 2011 and Sections 78 – 81 of the Companies Income Tax Act 2007.

46 'Nigeria Signs Multilateral BEPS Convention and CRS Multilateral Competent Authority Agreement to Tackle International tax Avoidance and Evasion' available at http://www.oecd.org/tax/nigeria-signs-multilateral-beps-convention-and-crs-multilateral-competent-authority-agreement-to-tackle-international-tax-avoidance-and-evasion.htm (accessed 15 August 2018).

47 Standard of Exchange of Information on Request.

48 Standard for Automatic Exchange of Financial Account Information in Tax Matters.

Expanding the Tax Net: General Tax liability should be imposed on owners and employees of online businesses, such that, people within a certain income bracket pay a fixed, or definite amount. Public-Private-Partnerships between tax Authorities and institutions like Banks and Various Online Partnerships will serve to expand the tax database, allow tax officials directly monitor transactions, and subsequently effectively tax such transactions.

The Nigerian government should also consider imposing taxes on multiple streams of e-commerce income, such as bank transactions and electronic payments which added US$460 million to Nigeria's GDP from 2011 to 2015.[49] They could also follow Uganda's example and impose taxes on the use of social media (though highly undesirable).

Vendors such as Alibaba, Ali express and Amazon all operate within Nigeria, frequently deliver goods, and earn revenue within the country. Many of them with domain names and website accessible only in Nigeria. The government could thus consider taxing online businesses for their virtual stores, whether an independent website, or an existing website, the same way ownership of physical shops are taxed.

As regards systems: Tax authorities such as the Federal Inland Revenue Service (FIRS) and the Lagos State Inland Revenue Service should work on creating technological solutions in order to appropriately monitor and tax e-commerce.

Furthermore, the 1998 Ottawa conference on e-taxation organised by the OECD regarding the creation of Taxation Framework Conditions in their draft Ministerial report, recommended that the following modified principles of taxation be applied, inter alia, to guide countries in taxing e- commerce schemes;

[49] The Nigeria Electronic Fraud Forum Annual Report (2016) A Changing Payments Ecosystem: The Security Challenge available at https://www.cbn.gov.ng/out/2017/ccd/a%20changing%20payments%20ecosystem%20neff%202016%20annual%20report.pdf (accessed 15 August 2018).

• Neutrality – taxation should seek to be neutral and equitable between forms of e-commerce and between conventional and e-commerce, so avoiding double taxation or unintentional non-taxation.

• Efficiency – compliance costs to business and administration costs for governments should be minimised as far as possible.

• Certainty and simplicity – tax rules should be clear and simple to understand, so that taxpayers know where they stand.

• Effectiveness and fairness – taxation should produce the right amount of tax at the right time, and the potential for evasion and avoidance should be minimised.

• Flexibility – taxation systems should be flexible and dynamic to ensure they keep pace with technological and commercial developments.

8.0 CONCLUSION

Taxation and Good governance are inextricably linked. The OECD opines both to be fundamental to the sustainable development of a state.[50] A state must have all necessary funds to sustain itself and provide for the basic needs and welfare of its citizens; this is where E-Commerce comes in. While taxing this economic sector might pose some difficulties to governments to developing States like Nigeria, as recognised above, these challenges are not insurmountable, and not without solutions. Nigeria can adopt solutions tried and tested by other states, or implement the solutions proposed in this essay. In world economies today, E-Commerce isn't the cherry on the cake, it's the new cake, and Nigeria deserves a piece of it.[51]

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[50] 'Tax and Good Governance' available at https://www.oecd-ilibrary.org/economics/tax-and-good-governance_gen_papers-2010-5kgc6cl2zv0q (accessed 15 August, 2018).

[51] Jean-Paul Agon-L'Oreal CEO

A Microscopic Appraisal of the Concept of Declaratory Reliefs under Nigerian Law

Michael Ogunjobi*

ABSTRACT

A manifest indelible mark, as oil on water, ingrained on the Nigerian legal system is- English law. Of note, the received English law consists of the common law, doctrines of equity, statutes and subsidiary legislations. Before the introduction of Order 53 to the English Supreme Court Rules which was accorded legal cloak by Section 31 of the Supreme Court Act, each family of remedies in English Courts had a distinct governing procedure. The way this influenced the evolution of judicial remedies, particularly declaratory reliefs under the Nigerian Legal system will be highlighted. By way of epiphany, declaratory reliefs are available in both ordinary and judicial review proceedings and are appropriate to challenge the validity of a legislation or document in need of interpretation or an executive or administrative act. A shortfall of declaratory reliefs is that no consequential relief is awarded, nevertheless, it is conclusive between the parties; further, litigants are now permitted to claim two or more remedies cutting across prerogative, equitable, and common law remedies in one suit at the same time. Hence, its relevance in apparent irrelevance is joggled.

1.0 INTRODUCTION

Admittedly, a party is in a position to know the other options available in furtherance of obtaining a remedy.[1] Courts in Nigeria serve as the repository of judicial power in redressing wrongs[2] since the judicial route moderates tensions[3]. The scope of judicial power is clearly captured by the erudite constitutional lawyer, Prof. Nwabueze[4] as follows:

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1 Wade H.W.R, *Administrative Law*, 4th Ed. (1977), Claremont Press Oxford) p 500.

2 see *Attorney General, Cross River State* v *Archibong* (1985)6 NCLR597.

3 N.J. Udombana, An African Human Rights Court and An African Union Court: A Needful Duality or Needless Duplication, *Brooklyn Journal of Int. Law vol. 28, 2003 No.3 at 813.*

4 B.O Nwabueze, *Judicialism in Commonwealth Africa London*, C. Haurst & Co. 1977 at 1-2.

i. The power to assume compulsory jurisdiction at the instance of a party and to inquire into the dispute.
ii. The power to determine authoritatively or conclusively the facts of the dispute.
iii. The power to determine authoritatively the law relevant to the dispute.
iv. The competence to arrive at a decision on the application of the relevant law to the facts and therefore finally disposes of the whole dispute.
v. The decision arrived at is binding on the parties to the dispute.
vi. The power to enforce compliance with the decision.

According to the learned author, P.A. Oluyede, 'a good legal system will produce efficient remedies and will regard such remedies as of utmost importance to the administration of justice'.[5] The importance of judicial remedies cannot be termed 'much ado about nothing', since the Charter of the United Nations unequivocally encourages pacific settlement of international disputes in order to promote world peace.[6] The structure of civil courts in Nigeria starts from the Supreme Court[7] down to Magistrate Courts or District Courts[8]. As will be seen, the English Legal System has rubbed off tremendously on the Nigerian Legal System.

Prior to 1977, each family of remedies in English Courts had a distinct governing procedure entailing that the remedies of damages, injunction and declaration were sought in an ordinary action, as in private law, while prerogative writs had a distinct procedure which could not be merged with an ordinary action.[9] This was the position until the introduction of Order 53 to the English Supreme Court Rules which was accorded legal cloak by Section 31 of the Supreme Court Act. Nigeria incorporated the pre-1977 reforms into her legal system

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5 *Nigerian Administrative Law* (1998) U.P.L (Ibadan) p. 491.

6 Article 1, United Nations Charter.

7 Whilst sections 230, 237, 249, 260, 265 and 270 of the Constitution of the Federal Republic of Nigeria 1999 (As amended) established the Supreme Court, Court of Appeal, Federal High Court, Sharia Court of Appeal, Customary Court of Appeal and the State High Courts respectively.

8 The Magistrate and District Courts are established by the National assembly and the Houses of Assembly of the State vide the inherent powers derived from section 6(2) and 6(5) 1999 Constitution, as amended.

9 M. Elliot and R Thomas, *Public Law, (Oxford) pp. 518-521*.

as part of the received English law and subsequently, the 1977 reforms were likewise adopted as can be gleaned from the various Rules of Courts.[10]

Almost all judgments of courts are enforceable, [11] save for a declaratory judgment which merely declares what the right of a party is[12], without imposing any sanction on a defendant.[13] The Supreme Court in the case of *Ag of Oyo State* v *Fairlakes Hotel Ltd*[14] defined Court judgment as the sentence of law pronounced by the Court upon the matter contained in the order. Happily, execution will be totally unnecessary where there is voluntary compliance with the judgments and orders of the courts.[15]

Remarkably, just like in Nigeria, in the United States, the federal government and most states enacted statutes in the 1920s and 1930s authorizing their courts to issue declaratory judgments.[16] Also, like Nigeria, in USA, judgments declaring rights are not entitled to enforcement *simpliciter*, but can be entitled to recognition. Recognition can occur when an enforcing party wants to preclude litigation of a declaratory judgment that has been previously litigated.

Similarly, in South Africa, a provincial or local division has jurisdiction over all relevant persons and offences within its area and also has discretion to enquire into and determine any existing, future or contingent rights or obligations, even where it is not possible for a person to claim any relief on the determination.[17]

Flowing from the above, it can be gleaned that orders of courts are meant to be obeyed in all jurisdictions regardless of absence of an

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[10] Prof. Oyelowo Oyewo, *Modern Administrative Law and Practice in Nigeria(*UNILAG Press and Bookshop Limited) 2016 p. 323.

[11] It is a general principle of law of great antiquity to the effect that where there is a violation of right there must be a remedy. Put in another way, *ubi jus ibi remedium* - meaning where there is a right there is a remedy. See the case of *INEC & Ors.* v *A.C & Ors*. Appeal No. CA/J/EP/GOV/419/2007 delivered on the 26th of February, 2008.

[12] The Advantages of the Declaratory Judgment in Admin Law, 18 MLR p. 138

[13] In Nigeria, the power of a Court to enforce and ensure compliance with its judgment or order is derived from Section 6(6)(a) of the 1999 Constitution (as amended).

[14] (1998) 12 SCNJ (Pt 1) 1 at 13.

[15] Declaratory Judgment in Nigerian Public Law 8 *NIJ* (1974) p. 42.

[16] See Declaratory Judgment Act, 28 U.S.C.S. § 2201.

[17] Section 19(1)(a)(iii), Supreme Court Act.

immediate enforcement mechanism. Declaratory reliefs is thus examined *in extensio*.

2.0 ENFORCEMENT OF JUDGMENT

Ever since the decision of the Supreme Court in *Bello* v *A-G Oyo State*[18], Courts have been enjoined to apply the maxim- *ubi jus ibi remedium* - meaning where there is a right there is a remedy in relevant cases.[19] In the case, Oputa, JSC observed as follows-

> Holt, CJ in the now famous case of *Ashby* v *White* (1703) postulated the principle that "if a Plaintiff has a right he must of necessity have the means to vindicate it, and a remedy, if he is injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. The maxim" *Ubi jus, ibi remedium* is simply the Latin rendition of the above principle. The maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statute, the Courts have been urged to create one. The Courts cannot therefore be deterred by the novelty of an action. They usually look at the facts. If from those facts a Court is satisfied:
>
> i. That the Defendant was under a duty to the Plaintiff;
> ii. That there was a breach of that duty;
> iii. That the Defendant suffered legal injury; and
> iv. That the injury was not too remote.

If all these factual situations exist, the Court will surely provide a remedy.

In Nigeria, the power of a Court to enforce and ensure compliance with its judgment or order[20] is derived from Section 6(6)(a) of the 1999 Constitution (as amended)[21] which provides that judicial powers of the court, viz: shall extend notwithstanding anything to the contrary

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[18] (1986) 5 NWLR (pt. 45) 828.

[19] see *FBN PLC* v *Associated Motors Co. Ltd.* (1998) 10 NWLR (pt.570) 441 & *Labode* v *Otubu* (2001) 1 NWLR (pt. 112) 256.

[20] Rulings on motions are ordinarily referred to as- orders, rather than judgments.

[21] Other laws that regulate enforcements of judgments in Nigeria are the Sheriffs and Civil Process Act, the Sheriffs and Civil Process Laws of the States and the Judgments (Enforcement) Rules made there under

in this constitution to all inherent powers and sanctions of a court of law.

Outside of our constitution, other laws that regulate enforcements of judgments in Nigeria are the Sheriffs and Civil Process Act,[22] the Sheriffs and Civil Process Laws of the States and the Judgments (Enforcement) Rules made there under. The Supreme Court in the case of *Tukur* v *Governor of Gongola State*[23] itemized the methods of enforcing different kinds of judgment as follows:

i. A judgment or order for the payment of money may be enforced by a writ of *fieri facias*, garnishee proceedings, a charging order, a writ of sequestration or an order for committal on judgment debtor summons.
ii. A judgment for possession of land may be enforced by a writ of possession, a writ of sequestration or committal order.
iii. A judgment for delivery of goods may be enforced by a writ of specific delivery or restitution of their value, a writ of sequestration or a writ of Committal.
iv. A judgment ordering or restraining the doing of an act may be enforced by an order of committal or a writ of sequestration against the property of the disobedient person.

For foreign judgments, there are two statutes regulating enforcement of foreign judgments in Nigeria namely:

1. Reciprocal Enforcement of Foreign Judgments Ordinance,[24] ("the 1958 Ordinance")and
2. Foreign Judgments (Reciprocal Enforcement) Act,[25] ("the 1990 Act").

The judgment creditor must institute an action in a Nigerian court claiming the reliefs granted in a foreign court.[26]

2.1 Types of Judgments

It must be emphasized that there are two parties to enforcement of a judgment. These are the judgment creditor and the judgment debtor. Notable types of judgments are:

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22 Cap S6, Laws of the Federation, 2004.
23 [1989]4 NWLR (pt.117) 592.
24 Cap 175, Laws of the Federation of Nigeria and Lagos, 1958.
25 Cap 152, Laws of the Federation of Nigeria, 1990.
26 See Babalola A: *Enforcement of Judgments* Published by Afe Babalola (Ibadan, Nigeria) 2004.

1. Interlocutory Judgment
2. Final Judgment
3. Consent Judgment
4. Declaratory Judgment: This, being the focus of this paper shall be discussed extensively.
5. Executory Judgments
6. Default Judgment

3.0 DECLARATORY RELIEFS

The history of declaratory orders as an equitable remedy is traced to the English Court of Appeal decision in *Dyson* v *Attorney General*[27]. A *locus classicus* on the power of the Court to grant declaratory orders is the case of *Guaranty Trust Coy of New York* v *Hanney & Co.*[28] wherein Banks L.J. held thus:

> There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the court in exercising a jurisdiction under the rule to grant relief and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors. I think the rule should receive as liberal a construction as possible

It is available to an individual who can prove that his private right including any of the fundamental human rights has been infringed by a government, its agent, any public authority, or another private person. Where a public right is affected, it is the Attorney-General who is competent to seek redress. [29] The purpose of a declaratory order is to state the rights and duties (or their absence) of certain persons without reference to enforcement.[30] Declaratory order is often the most desirable for of relief in disputes revolving around interpretation

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27 (1991) 1KB 410(CA).

28 (1915) 2 KB p.536 at 572.

29 Dr. Jacob Abiodun Dada, Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal, *Journal of Law, Policy and Globalization* Vol.10, 2013 p. 8.

30 Forsyth, *Private International Law*, Fifth Edition (2012), page 270.

of documents, originating summons is usually adopted in commencement of the action, thought the Court can order a conversion of same to a Writ subsequently if the facts are in dispute.

3.1 Case law Exposition on Declaratory Orders

As noted by Agbaje, J.S.C. in *Okoya & Ors* v *Santilli & Ors,*[31] a declaratory judgment is complete in itself since the relief is the declaration.

Nnaemeka-Agu, J.S.C. in *Oyeyemi & Ors* v *Irewole Local Gov., Ikire & Ors*[32] held thus:

> As for the contention that the judgment was not of a nature which could be restrained by an injunction because it was merely declaratory, I must point out that both parties into this claim and the counter-claim claimed for declaratory reliefs as well as injunctions. The plaintiffs/appellants failed while the defendants/respondents succeeded. So, although this court decided in *Chief R.A. Okoya* v *S. Santilli & Ors*, (1990) 2 NWLR (Pt.131) 173 at 224 & 228 that because a declaratory judgment cannot be enforced by execution but by a subsequent proceeding in which the declared right which has been violated can be enforced, there cannot be a stay of execution thereof, the position is different in this case in that there was an order of injunction which could be executed to enforce the right. Such a declaratory relief coupled with an injunction can always be executed or enforced by appropriate proceedings. In any case, a government or government agency against which a declaration of right has been made by its own court is expected to respect such a declaration without question, whereas a citizen who disregards such a declaration exposes himself to the danger of contempt of court proceedings. Whether such a proceeding for an injunction or for contempt has any merit is quite a different matter. I have already held that it has not in this case.[33]

The case of *Diamond Bank Ltd* v *Partnership Investment Company Ltd & Anor*[34] is apt, viz:-

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31 (1990) LPELR-2504(SC).

32 (1993) LPELR-2881(SC) (Pp.26-27, Paras. B-A).

33 Emphasis supplied.

34 (2009) LPELR-939 (SC) Per Ogbuagu JSC at p30.

> it is also settled that the High Court, has an inherent power to make Orders even if not sought where such orders, are "incidental" to the prayers sought. In Other words, a Plaintiff may be given such equitable relief as he may be entitled to even though he has not specifically asked for one.

Also, Kekere-Ekun**,** J.C.A in *Nwagu* v *Fadipe* [35]held thus: A court is also empowered to grant consequential reliefs flowing naturally from the relief (s) granted.

In *Guffanti Nigeria Plc.* v *Vaduz & Ors*[36], Jauro, J.C.A held as follows:

> The grant of the reliefs sought in an application of this nature is purely discretionary and the discretion must be exercised judicially and judiciously

In A-*G Federation & Ors* v *Bayawo,*[37] Galadima, J.C.A held thus:

> Generally, a Court of law has inherent powers to protect its orders. Once its order is made, it must be obeyed without questioning. This Court has a duty to give effect and enforce such order, unless it is shown that it is not made in accordance with the law, and Constitutional provisions.

Similarly, in *Chief Joseph Oyeyemi* v *Commissioner for Local Government Kwara State,*[38] the Supreme Court held –

> Courts have a duty to protect vested rights, as otherwise lawlessness will reign. So they have always taken the view that any attempt by a competent authority to take away a citizen's vested rights must be done in strict compliance with the law and any laid down procedure therefore. See Ojo v. Governor of Oyo State (1989) NWLR Pt. 95 Pg. 572; Wilson v. Attorney-General of Bendel State (1985) 1 NWLR Pt. 4 Pg. 572; Hart v. Military Governor of Rivers State (1976) 2 FNLR 215 at 226-7.

Iguh J.S.C**.** in *Yaro* v *Arewa Construction Ltd. & Ors*[39] held thus:

> It may thus be said that a defendant who has filed an appeal against a declaratory judgment or order or a judgment or

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35 (2012) LPELR-7966(CA) (P. 20, paras. A-C).
36 (2011) LPELR-4221(CA) (P. 13, para. A).
37 (2000) LPELR-10409(CA) (P. 17, paras. F-G).
38 (1992) 2 SCNJ 266 at 278.
39 (1998) LPELR-3517(SC) (Pp. 23-24, Paras. F-G).

> order which is not executory or involves enforcement against a party cannot apply for a stay of execution of such judgment or order which by its very nature has no coercive effect and threatens no one.

Idigbe J.S.C in *Akunnia* v *A-G of Anambra State*[40] explained thus:

> The end result of an action, whatever its nature and no matter how framed, is that the party who approaches the Court obtains the order he seeks; the order he seeks may be declaratory or executory. It is executory where the order declares the rights of the parties before the Court and then proceeds to enjoin the defendant to act in a certain way. It is declaratory where it merely proclaims the existence of a legal relationship, but contains no specific order to be carried out by, or enforced against, the defendant. In the first class of order (executory) it is necessary to have the assistance of the law enforcement agencies to carry out the order, if the order of the Court is disregarded; there is hardly any need for this in the second class of order (declaratory) (See Zamir on Declaratory Judgment 1962 edition Page (1).

Also, Omo, J.S.C. in *Ogunlade* v *Adeleye*[41] noted thus:

> whilst an executory judgment is capable of immediate execution, a declaratory judgment gives no such right. It merely declares the rights of the parties. The rights which it confers on the plaintiff can only become enforceable if another and subsequent judgment, albeit relying on the rights it declared, so decrees. Such a subsequent judgment conferring the power of execution is executory. The date of enforceability must be the date of the subsequent (executory) judgment and not the earlier judgment, which is merely declaratory. In the instant case the date of enforceability, from which the 12 year limitation period can be calculated is the 29th May, 1980 and not the 2nd July, 1948. The contention that Section 4(4) of the Limitation Act (supra) applies to bar such a judgment does not therefore arise.

3.2 Exposition of Rules of Court on Declaratory Orders

Order 3 rules 5 – 7 of the Lagos State High Court (Civil Procedure) Rules 2012 provides:

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40 (P.17, Paras. A-E).

41 (1992) LPELR-2340(SC) (Pp. 12-13, paras. G-D).

> 5. Any person claiming to be interested under a deed, Will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.
> 6. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an enactment, may apply by originating summons for the determination of such question of Construction and for a declaration as to the right claimed.
> 7. A Judge shall not be bound to determine any such question of construction if in his opinion it ought not to be determined on originating summons but may make any such Orders as he deems fit.

Order 40 Rule 1 (1), Lagos State High Court (Civil Procedure) Rules 2012 provides that

> An application for:
> (a) an order of mandamus, prohibition or certiorari; or
> (b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provisions of this Order.
> (2) An application for a declaration or an injunction (not being an injunction in rule (1)(b) of this Rule) may be made by way of an application for judicial review and the Court may grant the declaration or injunction if it deems it just and convenient to grant it by way of judicial review, having regard to:
> (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;
> (b) the nature of the persons and bodies against whom relief may be granted by way of such an order;
> (c) all the circumstances of the case.

Section 19 National Industrial Court Act 2006[42] states the power of the Court to make certain orders, viz:

> The Court may in all other cases and where necessary make any appropriate order, including-
> (a) the grant of urgent interim reliefs;
> (b) **a declaratory order**;

[42] Cap N115, Laws of the Federation, 2004.

(c) the appointment of a public trustee for the management of the affairs and finances of a trade union or employers' organisation involved in any organisational dispute;
(d) an award of compensation or damages in any circumstance contemplated by this Act or any Act of the National Assembly dealing with any matter that the Court has jurisdiction to hear; and
(e) an order of compliance with any provision of any Act of the National Assembly dealing with any matter that the Court has jurisdiction to hear.

Order 15 Rule 18(4), Lagos State High Court (Civil Procedure) Rules 2012 provides:

> No proceedings shall be open to objection on the ground that only a declaratory Judgment or order is sought thereby and a Judge may make binding **declaration of right** whether any consequential relief is or could be claimed or not.[43]

Order 11 Rules 10, 15 and 16 of the Judgment Enforcement Rules provides that, a party who is entitled may, upon the fulfillment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the court for leave to issue execution:-

> 10. Subject to any provision to the contrary, any application by a party for an order or direction of a court in relation to any judgment, execution, or, process shall be made in the same manner as an application for an interlocutory order in that court…
>
> 15. Where the judgment is to the effect that any party is entitled to any relief, subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the court for leave to issue execution; and the court may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried as in a suit.
>
> 16. Where a person not being a party in a proceeding obtains an order or has an order made in his favour, he shall be entitled to enforce obedience to such order by the same

[43] Emphasis supplied.

process as if he were a party in the proceeding; and any person not being a party in a proceeding against whom obedience to any judgment may be enforced, shall be liable to the same process for enforcing obedience to such judgment as if he were a party to the proceeding.[44]

3.3 Appealing Declaratory Orders

According to S.240 of the 1999 Constitution (as amended), the Court of Appeal has exclusive jurisdiction to hear appeals from the High Courts, State and Federal, as well as from the Sharia and Customary Courts of Appeal. Such appeal may be as of right or with leave. S.241 (1) sets out the various instances where an appeal from the High Court to the Court of Appeal can be as of right. These include appeal against:

> (a) final decision in civil or criminal cases before the High Court sitting at first instance; (b) decisions in civil or criminal cases where the ground of appeal involves questions of law alone; (c) decisions in civil or criminal proceedings on question as to the interpretation of the Constitution; (d) decision in any civil or criminal proceedings on question as to whether any of the provision of Chapter IV of the Constitution (relating to fundamental rights) has been , is being or is likely to be contravened in relation to any person; (e) decision in criminal cases where the High Court has imposed a sentence of death; (f) decisions by the High Court: (i) where the liberty of a person or custody of an infant is concerned; (ii) where an injunction or appointment of a receiver is granted or refused; (iii) in the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise; (iv) in the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability, (v) and such other cases as may be prescribed by any law in force in Nigeria.

4.0 ADVANTAGES OF DECLARATORY RELIEFS

(a) It serves as a veritable means of aborting threatened litigation
(b) It is available where no other relief could be granted

[44] Emphasis supplied.

(c) It affords a speedy remedy.
(d) It is equally cost effective
(e) It ultimately avoids protracted litigation
(f) It gives room for the grant of negative reliefs sought
(g) It is quite helpful in patent litigation, as well as in other areas of intellectual property litigation.
(h) It affords for an early resolution of basic legal rights, which ultimately expedites resolution of other contentious issues in a suit.
(i) It gives room for seeking clarity and certainty in administrative governance, particularly in the regulatory context.
(j) It serves to preempt vexatious lawsuits, breach of contract or infringement of rights.[45]
(k) It is relevant since statute of limitations can defeat an otherwise good case if not timeously filed

4.1 Impediments/Challenges to the Grant of Declaratory Order and Other Judicial Remedies

(a) Problem of Disobedience to Court Orders: Undoubtedly, it is one thing for a court to grant a remedy but quite another for the successful litigant to reap the fruits of the judgment.[46] This is because judgments and orders of courts are not self-executing and the judiciary does not have its own means of enforcing its judgments.
(b) Problem of Locus Standi: At times, this discourages litigations serving as impediment. Of note, the Court largely has an open arms in modern times in according right to sue.
(c) Constitutional Derogations: The various constitutional limitations and qualifications imposed on human rights constitute great impediments to their enjoyment.[47]
(d) Ouster Clauses: This out rightly limits the jurisdiction of courts.

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[45] See Michael O. Ogunjobi's opinion in the piece- The Right To Wear Hijab, Versus The Right To Wear Uniform (June 21, 2016, The Guardian Newspapers).

[46] See Chidi Ansalem Odinkalu, Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa, 47, *J. of Afr. L. 1-37 (2003) 86.*

[47] See Section 45(1) of the 1999 Constitution (as Amended).

(e) Corruption: This is a problem all the sectors in Nigeria is confronted with.[48]
(f) Cost Of Litigation
(g) Delay In Dispensation Of Justice

5.0 CONCLUSION

Just as already espoused, declaration is an appropriate means of challenging the validity of a legislation or document in need of interpretation or an executive or administrative act, which is unlike certiorari or prohibition that are employed to challenge judicial or quasi act. As expounded, there are some unenforceable judgments such as a declaratory judgment.

As sufficiently discussed, a remarkable feature of declaratory judgment is that it is a binding adjudication on the rights, obligations and status of the litigants even though no consequential relief is awarded, but nevertheless, it is conclusive between the parties in a subsequent action as to the matter declared in accordance with the principle of res judicata.[49]

Since the landmark decision of the English Court of Appeal in *Dyson* v *Attorney General*,[50] declaratory judgments have become very helpful as a legally binding preventive adjudication mechanism by which a party involved in an actual or possible legal matter can ask a Court to conclusively rule on and affirm the rights, duties, or obligations of one or more parties in a civil dispute (subject to any appeal). Though the rights which it confers can only become enforceable if another and subsequent judgment albeit relying on the rights it declared, so decrees; succinctly, they are usually sought together with some other positive reliefs such as injunction, damages or habeas corpus.[51]

Of note, a declaratory order or judgment cannot be stayed by an interim order except where the declaratory order is coupled with

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[48] See J.A. Dada & M.E Ibanga, "Human Rights Protection in Nigeria: From Rhetoric to Pragmatic Agenda", *African Journal of Law and Criminology Vol.1 No 2 (2011) 70-81*.

[49] See *Kuti* v *Alashe* (2005) 17 NWLR (Pt 955) 625 at 657-658

[50] (1991) 1KB 410(CA)

[51] Dr. Jacob Abiodun Dada, Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal, *Journal of Law, Policy and Globalization Vol.10, 2013 p. 8.*

mandatory order such as an injunction.[52] Also, a distinctive feature of declaratory judgments is that same provides legal certainty to each party in a matter when this could resolve or assist in a disagreement.

5.1 Recommendation

While constitutional and institutional reforms are required to ensure the effectiveness of judicial remedies, the important role of the court must be emphasized. Consequently, the following proposals are made in order to overcome the identified impediments-[53]

1. Courts must demonstrate unmistakable judicial activism and eschew technical barriers to access to justice[54]
2. Legal aid must be encouraged by Ministries of Justice to enable indigent victims access appropriate judicial remedies.[55]
3. Inexpensive, informal and easier procedure[56] should be designed by the judiciary to aid expeditious adjudication of cases.[57]
4. Enforcement of compliance with judicial awards should be encouraged by private individuals and government agencies alike.[58]

The Constitutional impediment of locus standi must be accorded liberal and progressive interpretation to encourage public spirited individuals and non- governmental organizations to approach the temple of justice without inhibition.

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52 See Prof. Oyelowo Oyewo, *Modern Administrative Law and Practice in Nigeria* (UNILAG Press and Bookshop Limited) *2016 p. 356.*

53 Also see P.N Bhagwatti, Inaugural Address, Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore 24-26 February, 1988, Commonwealth Secretariat, *1988 at xxi.*

54 Michael O. Ogunjobi, Succour for The Dead, http://www.thelawyerschronicle.com August 8*, 2016 (*accessed 4 August, 2018).

55 See, Legal Aid Council Act, LFN 2004 Cap. 37.

56 The Small Claims' Court commissioned by the Chief Judge of Lagos State on Monday, 23rd April 2018 is a commendable initiative in this regard.

57 See, Akinola Aguda, "Law Versus Justice", being the full text of the Second Foundation Day Lecture of the Ondo State University, Ado- Ekiti, delivered on Friday, March 30, 1984 at 19.

58 See Michael O. Ogunjobi, Juridical Review and Implications of the Whistle Blower Bill 2017 on the Nigerian Criminal Justice System, *Fourth Edition Of The University Of Nigeria Bar Journal (The Legalogue).*

The Nigeria Football Federation: FIFA's Rule as to Non-Interference in Football by The Government

Eribake Oloruntoba*

ABSTRACT

The jurisdiction of national governments in football matters has been detailed by Federation Internationale de Football Association (FIFA), which frowns at government intervention in football. FIFA, as an independent body, has tried to promote the non-involvement of governments in football affairs and has stringent punishment for erring member associations. The regulations of FIFA provide for autonomy of its member associations, as well as lack of interference from the government in football matters. This article seeks to discuss FIFA's rule as to the non-interference in football by the government.

1.0 INTRODUCTION

The power of FIFA to place a ban on countries for government interference in football matters over the years has been a complex decision for countries. The fact that most member associations, especially African countries, are dependent on their government for funds to make football administration better has led to intervention by the government on various occasions. FIFA however believes in the autonomy of its member associations, especially with the election or appointment of its new association head. In a study of African football, Zimbabwean sociologist Manase Kudzai Chiweshe concluded that FIFA's standing statutes of non-interference have often meant corrupt leaders (of African sporting organisations) continuing in their positions for decades and that the major obstacles facing all countries from combating corruption in football are FIFA's statutes of non-interference.[1] In recent times however, governments of various nations have interfered in the election of Association heads, and while

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1 M.K. Chiweshe, "The Problem with African Football: Corruption and the (Under) development of the Game on the Continent" (February 2014) *African Sports Law and Business Bulletin* 27–33 available at http://www.africansportslawjournal.com/Bulletin_2_2014_Kudzai.pdf (accessed 18 August 2018).

some have been banned or threatened to be banned, Nigeria has been a victim of both circumstances, with the recent happenings in 2018 not being any different.

2.0 FIFA RULES ON GOVERNMENT INTERFERENCE

From the early 1990's onward, FIFA promptly responded to third party or governmental interventions by suspending or threatening to suspend the affected national federation until the interference stopped and any changes brought about by it were reversed.[2] The suspension meant that the affected federation could not participate in any international football matches, including the popular FIFA World Cup and the Confederation Cups.[3]

Government intervention in football has been overtly criticised by FIFA. Article 17 of the FIFA Regulations[4], provides that: "Each member shall manage its affairs independently and with no influence from third parties." The codification of this shows FIFA's vehement stance on the issue of government non-inference.

2.1 Third Parties in Football

With FIFA being an independent body, "third parties" in this sense would be referred to as the government. The notion "governmental interference" is broadly defined. FIFA depicts political interferences as primarily resulting from dissatisfaction with sporting performances.[5] Political interference also includes legislative acts adopted by parliaments as well as judicial actions against Football Associations or officials. Under the FIFA statutes, to attain the Chairmanship position

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2 For an example of such an action, *see* Letter from Fatma Samoura, Secretary General, FIFA, to the Members of FIFA (Mar. 17, 2017), https://resources.fifa.com/mm/document/affederation/administration/02/87/68/52/circularno.1577-suspensionofthemalianfootballfederationasof17march2017anduntilfurthernotice_neutral.pdf (accessed 8 July 2018).

3 FIFA Statutes available at http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf 14–15 (accessed 18 August 2018).

4 *ibid* article 17; Regulations Governing the Application of the Statutes.

5 B. Garcia and H.E. Meier "The Power of FIFA over National Governments: A New Actor in World Politics?" Presented at: FLACSO-ISA Joint International Conference, Global and Regional Powers in a Changing World, 23rd-25th July 2014, University of Buenos Aires, Argentina.

under any Municipal football governing body it must either be through election or appointment[6]. In an interview with FIFA.com, Thierry Regenass, discussing about political interference, said:

> FIFA has the mandate to control association football worldwide, in all aspects. This mandate is delegated to the national association, to control association football at the national level.
>
> This is about managing, controlling and developing football as a game and also organization of the game in general. The associations have the obligation to do it on their own, in an autonomous way without outside interference, from the government or any other parties. In general, *political interference is when a government tries to take direct control.* [7] (Italics mine)

Third parties in football can therefore mean intervention in football matters by non-football bodies, in this case, it could mean governmental parastatals that have no vires on footballing matters and could more importantly also include national governments. In some cases, sports ministers are involved in the politics of football associations, the current trend is the act of removing the Chairman of the Football Association and installing some other person into the role. In 2017, FIFA banned Mali's Football Association, Federation Malienne de Football (FEMEFOOT) due to government interference in football matters.[8] The action by FIFA was prompted after the executive committee of FEMEFOOT was dissolved by the Sports Minister. FIFA stated that:

> No team from Mali of any sort (including clubs) can take part in international competitions as of 17 March 2017 and until the suspension is lifted.

The independence of National Football Associations seems far-fetched due to the fact that majority are funded and sponsored by the

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6 Article 17(2) *supra n. 3*

7 FIFA.com "Regenass: We have strong Principles" available at http://www.fifa.com/about-fifa/news/y=2011/m=10/news=regenass-have-strong-principles-1528544.html (accessed 8 July 2018)

8 BBC "Malian FA *Suspended by FIFA* over Government Interfer*ence"* http://www.bbc.com/sport/football/39294566 (accessed 8 July 2018)

government, thus putting them within the control of the government. In an interview, the UK Sports Minister Tracey Crouch stated that the government could be forced to intervene in the Football Association if satisfactory reforms were not carried out. She however stated that the term "government intervention" had a wide interpretation. She said:

> Looking at what it says in the FIFA regulation it is incredibly wide in terms of the interpretation of government involvement… actually just saying 'I'm going to remove public funding' could be interpreted as government interference in the running of the Football Association.[9]

It therefore means that national Football Associations are far from being free from the control of their national governments.

2.2 Examples of FIFA Disciplinary Actions Against Countries

2.2.1 Spain

In 2008, FIFA threatened to suspend Spain from Euro 2008 unless the Spanish Government allowed the Spanish Football Federation's elections to proceed[10].

2.2.2 Indonesia

In 2015, the FIFA Executive Committee suspended the Indonesia Football Association (PSSI) with immediate effect due to what FIFA labelled the "take over" of Indonesia's national football governing body by the Indonesian authorities.[11]

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[9] "FIFA Won't Stop Government from Pushing Through FA Reform, Says Sports Minister" http://www.eurosport.com/football/fifa-won-t-stop-government-from-pushing-through-fa-reform-says-sports-minister_sto5986102/story.shtml (accessed 25 July 2018).

[10] World Sports Law Report "FIFA Regulations: FIFA's Article 17: Government Involvement in Sport" available at http://www.e-comlaw.com/world-sports-law-report/article_template.asp?ID=1017 (accessed 8 July 2018).

[11] Sports Integrity Initiative, "Government interference leads to FIFA suspension of Indonesian Football Association" available at http://www.sportsintegrityinitiative.com/government-interference-leads-to-fifa-suspension-of-indonesian-football-association/ (accessed 8 July 2018).

2.2.3 Benin

In 2016, FIFA suspended the Benin Football Federation (FBF) from global football due to a court ruling in the country which blocked upcoming elections. In its statement, FIFA stated that:

> The Benin Football Association (FBF) was suspended with immediate effect due to a recent injunction by a local judicial court which impeded the holding of the due election.[12]

2.2.4 Kuwait

On the 9th of October 2007, elections had been held in Kuwait – a decision contrary to the decision of the FIFA Executive Committee in May 2007. This led to the committee recommending to the FIFA Executive Committee that the Kuwait Football Association be suspended.[13] Kuwait's Football Federation board resigned days after FIFA suspended the Gulf Arab State.

2.3 Effects of FIFA Sanctions

In recent times, FIFA has been more stringent in enforcing its laws and protecting the independence of its members. This has led to the suspension of a number of member associations. It has also affected the players who are unable to partake in international competitions with their colleagues from other nations. Under FIFA Regulations, the punishment for erring member nations can be seen in Article 14(3) of the FIFA Regulations[14] which provides that:

> A suspended member shall lose its rights. Other members may not entertain sporting contact with a suspended member. The Disciplinary Committee may impose further sanctions.

In an interview, a national team defender Talal Al – Fadhel stated that the two year hiatus had killed off a generation of talent. He said:

> It's had a huge effect both at home and abroad. Domestically the Kuwaiti players have no real ambition at present.

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[12] BBC, "Benin Suspended from Global Football by FIFA" available at http://www.bbc.com/sport/football/36265254 (accessed 8 July 2018)

[13] Wikipedia, "http://en.m.wikipedia.org/wiki/Kuwait_Football_Association#FIFA_Suspension (accessed 8 July 2018).

[14] Article 14(3) supra n. 3.

> Internationally our ranking has plummeted, our national team doesn't play and our clubs don't take part in international competitions. I didn't expect the suspension to last this long, it has finished off a generation completely.[15]

3.0 APPLICATION OF FIFA LAWS IN THE INTERNATIONAL SPHERE

The general rule with regard to the position of municipal law within the international sphere is that a state which has broken a stipulation of international law cannot justify itself by referring to its domestic situation. It is no defence to a breach of an international obligation to margue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reasons for this inability to put forward internal rules as an excuse to evade international responsibility are obvious. Any situation would permit international law to be evaded by the simple method of domestic legislation.[16] Article 27 of the *Vienna Convention on the Law of Treaties, 1969* lays down that in so far as treaties are concerned, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement, while Article 46(1) provides that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating it consent.[17] The International Court, in the *Applicability of the Obligation to Arbitrate*[18] Case, has underlined 'the fundamental principle of international law that international law prevails over domestic law'.

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[15] Arab News, "Sports" available online at www.arabnews.com/node/1206131/sports (accessed 8 July 2018).

[16] M.N. Shaw, *International Law* 7th ed. (Cambridge: 2014) pp. 95-96.

[17] Note also article 13 of the Draft Declaration on the Rights and Duties of States, 1949, which provides that every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in the constitution or its laws as an excuse for failure to perform the duty" *Yearbook of the ILC*, 1949, pp. 303, 430.

[18] Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, Order of 9 March, I.C.J. Reports, p.3.

In line with the FIFA disciplinary code, member associations of FIFA are also bound by the rules of FIFA.[19] Under FIFA laws, the judicial bodies of the association are The Disciplinary Committee, the Appeals Committee and the Ethic Committee.[20]

4.0 THE NIGERIA FOOTBALL FEDERATION

The Nigeria Football Federation (formerly known as the Nigeria Football Association until 2018) is Nigeria's football governing body.[21] The Nigeria Football Federation, although renamed, was established under the Nigeria Football Association Act of 2001. Article 1 of the Act states that:

> 1. There is hereby established an association to be known as the Nigeria Football Association.
>
> 2. The Association:
>
> a. shall be a body corporate with perpetual succession;
>
> b. may sue and be sued in its corporate name.

Thus, the Nigerian football body is a government established institution, although it has been clearly stated by FIFA that there should be no government interference in football.

4.1 The Chairmanship

The position of Chairman of the Nigeria Football Federation is provided for under Article 4 of the Nigeria Football Association Act, which states that: The members of the Board shall elect one of their members to be the Chairman of the Board.

The Chairman of the Nigeria Football Federation is Amaju Pinnick[22], recognised by FIFA, the world football governing body. In 2014, Amaju Pinnick, who was the Delta State Football Association Chairman, won

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[19] Article 13(1) supra n. 3.

[20] Article 76 of the FIFA Disciplinary Code: "The judicial bodies of FIFA are the Disciplinary Committee, the Appeal Committee and the Ethics Committee."

[21] allAfrica.com Nigeria: NFA Change Name to NFF available at https://allafrica.com/stories/200807250925.html (accessed 8 July 2018).

[22] AIT, "Amaju Pinnick wins NFF Elections" available online at www.aitonline.tv/postbreaking_amaju_pinnick_wins_nff_election (accessed 8 July 2018).

the NFF election in Warri[23] after he garnered 25 votes during the first round, and 32 votes at the second round. The election, however, did not occur without any trouble (as has been the case in recent years). An injunction was purportedly granted to a group led by Mr. Chris Giwa.

4.2 Power of the Minister

The Act provides for the Minister to give directives to the Nigeria Football Federation by virtue of Article 19 which states that:

> Subject to the provisions of this Act, the Minister may give the Association directives of a general or specific nature, with regard to the exercise by the Board of its functions under this Act.

5.0 GOVERNMENT INTERVENTION IN NIGERIAN FOOTBALL

In 2014, Nigeria was banned from all international levels of football by FIFA's emergency committee due to the intervention of government in football, after a court order which compelled the Nigerian Minister of Sports to appoint a civil service member to run the NFF. The ban was however reversed after FIFA ordered the reinstatement of the NFF president.

On the 2nd of July, 2018 the Federal Ministry of Youth and Sports Development directed the Nigeria Football Federation board[24], led by Mr Amaju Pinnick, to step down. In his statement, the Sports Minister stated that:

> It is trite law that court orders are sacrosanct and any act of disobedience to it constitutes threat to the rule of law. Consequent upon the above, you are hereby advised to comply with the orders of court made therein which for now

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[23] Goal, Amaju Pinnick is New NFF President available at http://www.goal.com/en-ng/news/4093/nigerian-football/2014/09/30/5145094/amaju-pinnick-is-new-nff-president (accessed 8 July 2018).

[24] Daily Trust, "FG directs Amaju Pinnick to step down as NFF President, tells Chris Giwa to take over" available online at www.dailytrust.com.ng/breaking-fg-directs-amaju-pinnick-to-step-down-as-nff-president-tells-chris-giwa-to-take-over-259037.html (accessed 8 July 2018).

> is the valid and binding order of the court, in the absence of any other subsisting order or judgment to the contrary.

It must be remembered that the root cause of this tussle was the election held in 2014 of which Amaju Pinnick was declared the president of the NFF. The major concern for the Nigeria Football Federation would be the fact that it is an institution created by an Act, thus making it loyal to the Ministry of Sports (or Federal Government). However, the fact that it is also a member of FIFA, has contributed to the problem - the locking of horns between the laws of the land and the laws of FIFA. Without a doubt, the laws of Nigeria control activities within Nigeria as a territory by virtue of section 1(2) of the 1999 Constitution which provides for the supremacy of the Constitution.

FIFA, as a body also has laws guiding its member nations, of which Nigeria is one. FIFA recognises the Court of Arbitration for Sports (CAS) as a judicial body that rules on football related matters and makes final decisions as regarding football disputes. Article 66[25], recognises the Court of Arbitration for Sport (CAS) to resolve disputes between FIFA, members, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents. The ruling of the Nigerian court juxtaposed with the decision of FIFA raises the question, "How can two 'illegitimate' boards rule the Nigerian Football Federation considering the fact that Mr. Chris Giwa is currently serving a five year ban from football, and football related activities?" The fallouts of the 2014 election led to the case being filed at the Court of Arbitration for Sports in the case of *FIFA* v *Nigerian Football Federation*[26]. The appellant, Mr. Giwa, claimed that the election which took place on 26 August 2014 was well conducted and the procedures were in accordance with the FIFA statutes. However, the election was not recognised by FIFA, who in a letter stated:

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[25] Article 66(1) *supra note 3,* "FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agents."

[26] *Nigerian Football Federation* v *FIFA,* CAS2014/A/3744*; Nigerian Football Federation* v *FIFA* CAS2014/A/3766.

> … as a consequence, we will not recognize the outcome of the above-mentioned elections and should there still be persons claiming to have been elected and occupying the NFF offices at midnight on Monday 1 September 2014, we will bring the case to the appropriate FIFA body for sanctions, which may include the suspension of the NFF.

On the 30th of September 2014, Mr. Amadu, the then General Secretary of the NFF informed FIFA about the election taking place in Warri, which led to the election of Mr. Amaju Melvin Pinnick as the President of the NFF. On 1 October 2014, Mr Joseph Blatter, the then President of FIFA congratulated Pinnick through a letter for being elected as the NFF President:

> I would like to extend my sincere congratulations and best wishes of success on the occasion of your election as the new President of the Nigeria Football Federation…

It must be noted that in his brief, the appellant stated that the applicable laws are the FIFA regulations, as well as the NFF Statutes 2010 and the NFF Electoral Code. The Respondent on the other hand pointed to Article R58 of the CAS Code and Article 13 of the FIFA Statutes, which support the fact that as a member association of FIFA, the NFF is subject to FIFA regulations. The Court of Arbitration for Sports, however, dismissed the appeal filed by the appellant, on the ground that FIFA has the power to not recognise an election if it is not in line with Article 17 of the FIFA Statutes, regardless whether the elections might have been valid in terms of Nigerian law, the NFF Statutes or the NFF Electoral Code.

6.0 THE NEED FOR A NATIONAL COURT OF ARBITRATION FOR SPORTS

The Court of Arbitration of Sports is based in Lausanne, Switzerland[27], and it was established in 1984 by Juan Antonio Samaranch, the then President of the International Olympic Committee (IOC), and Judge Keba Mbaye, an IOC member and judge on the International Court of

[27] The CAS has decentralised offices in New York and Sydney and has established alternative hearing centres in Abu Dhabi, Shanghai, Kuala Lumpur and Cairo.

Justice.[28] Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to either The Ordinary Arbitration Division[29] or The Appeals Arbitration Division[30] according to their nature. Such assignment may not be contested by the parties or raised by them as a cause of irregularity. In the event of a change of circumstances during the procedure, the CAS Court Office, after consultation with the panel, may assign the arbitration to another division. Such reassignment shall not affect the constitution of the Panel or the validity of the proceedings that have taken place prior to such re-assignment.[31]

In Nigeria, a National Court of Arbitration for Sports would be of essence in solving the sports crisis in Nigeria. Although, under the NFF statutes, there are provisions that establish a domestic dispute resolution tribunal, there still has been no creation of such tribunal. Articles 4(3), 72 and 73 of the NFF Statute[32] provide that:

> Article 4:
>
> 3. NFF shall provide the necessary institutional means to resolve any internal dispute that may arise between Members, Clubs, Officials and Players of NFF.
>
> Article 72:
>
> NFF shall establish a National Dispute Resolution Chamber which shall deal with all internal national disputes between NFF, its members, players, officials, match and players agent that do not fall under jurisdiction of its judicial bodies. The Executive Committee shall draw up special regulations regarding the composition, jurisdiction, procedural rules of the National Dispute Resolution chamber, which shall been in compliance with the FIFA directive on the subject.

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28 M. Reeb, "The Role and Functions of the Court of Arbitration for Sport (CAS)" in I.S. Blackshaw et al (eds.), The Court of Arbitration for Sport (2006) pp. 31-39.

29 Article R27 'Application of the Rules' of CAS Statute

30 *ibid* at n. 28.

31 Statutes of the Bodies Working for the Settlement of Sports-Related Disputes.

32 K.C. Omuojine, Esq. "Dispute Resolution in Nigerian Football: The Need for a National Dispute Resolution Chamber" (2014) 2 *African Sports Law and Business Bulletin,* 22.

> Article 73
>
> 1. NFF, its members, players, officials and match and player's agents will not take any dispute to ordinary Courts unless specifically provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF, WAFU or NFF.
>
> 2. NFF shall have jurisdiction on internal national disputes i.e. disputes between parties belonging to NFF. FIFA shall have jurisdiction on international disputes i.e. disputes between parties belonging to different Associations and/or Confederations.

It is possible to infer, therefore, that the tribunal is one that can and should be able to solve football matters, rather than filing cases at civil courts. However, a National Court of Arbitration for Sports will not only help solve sports matters; it would also lighten the burden of civil courts which would help them focus on more pressing issues. The National Court of Arbitration for Sports should be able to resolve issues as regarding presidential posts in the various sport federations, as well as other matters within the sports circle.

The creation of such courts would however need a constitutional amendment (with section 6 of the Constitution in view).Like the National Industrial Court was established to handle employment and labour matters, the National Court of Arbitration for Sports would be able to have jurisdiction over sports matters, and aggrieved parties would be able to appeal to the Court of Arbitration for Sports (if need be).

7.0 CONCLUSION

In conclusion, contrast between the laws of FIFA, being an international body, and the Constitution of Nigeria, as municipal law, can be solved if the FIFA statutes are domesticated into Nigerian law. Domestication would make FIFA laws have a legal standing in Nigeria, as well as make it effectively enforced in Nigeria. Also, the Nigerian Football Federation, until it ceases to be a government established institution, cannot ask for "non-government intervention", especially due to the fact that it often seeks for funds from the government. It is thus pertinent that there must be a swift dispute resolution mechanism to handle possible friction between relevant football parties or

between non-sports institutions and sports institutions, the creation of a National Court of Arbitration for Sports would provide a sustainable solution for Nigerian sports in general and alleviate the burden of civil courts.

The Future of "Genuine Link" in the Registration of Vessels: The Aftermath of M/V Saiga

Sodiq Abiola Lawal *

ABSTRACT

No doubt, a sovereign, ideally, should have discretion over the grant of its nationality to its subjects. However, in instances where such grants have international inclinations, the comity of nations should be able to reach a consensus where all parties' interest will be protected and the sovereignty of party states will not be undermined.

Vessels, like human beings, are conferred nationality of the country wherein they are registered. They are administered, controlled by the country. Furthermore, in the event of an action against a vessel, the country of registration is the country of jurisdiction. Consequently, countries having no connection with a ship in terms of ownership, control and manning are at liberty to register such vessel as its national. The concept of genuine link was introduced to bypass the absolute discretion of states in granting nationality to ship but the tribunal in MV Saiga failed to uphold this reasoning. This article explores the use of the genuine link theory as a rationale for the registration of ships and examines the decision of the court in MV Siaga.

1.0 INTRODUCTION

The controversial concept of genuine link has been a subject of discussion for over 60 years, in the international community. The sovereign's discretion to grant nationality to vessels which caused massive reflagging of ships, from traditional maritime states to flags of convenience, precipitated this controversy.

The development of open registries which encouraged ship owners to avoid tax, maintain anonymity and exploit their crew, met with serious opposition in labour interests, developing economies and traditional maritime states. In an attempt to stem the hemorrhage of tonnage to open registry, the principle of "genuine link" was introduced by the Draft Articles to the Convention on the Law of the Sea, 1956[1].

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Unfortunately, the concluding sentence, which was the essential part of the Draft Articles' relevant section was not included in *Article 5(1) of the Convention on the High Seas of 1958*[2].

The Convention, and other conventions that came after it did not clearly define what the term "genuine link" means, thus subjecting it to judicial and intellectual arguments. While proponents of open registry argue that the term only reinforces the control and jurisdiction exercised by flag state over registered ships, their opponents posit that the term introduces a restriction on the right of sovereigns to grant nationality to a vessel.

The case in review seems to have settled this argument in favour of the former. It is submitted in this paper that in light of the recent activities of the Food and Agriculture Organization and the enactment of the *1986 United Nations Convention on Condition for Registration*[3]*,* the interpretation of the term would change to favour the arguments of the oppositions.

This paper is divided into five parts. Accordingly, part 1, which is the present part is an introduction into the subject matter of the write up.; Part 2 then attempts to explicate the concept of ship registration in-depth explanation of the M\V Saiga case while part 3 is a conceptual analysis of genuine link.; Part 4 is the personal opinion of the writer on the subject matter while part 5 is the conclusion.

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1 *Article 29* of the *Draft Articles on the Law of the Sea* provided that "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship".

2 The equivalent of the section in the United Nations Convention on the Law of the Sea that formed the basis of the decision in the M\V Saiga case.

3 United Nations Convention on Conditions for Registration of Ships Geneva, 7 February 1986 available online at https://treaties.un.org/doc/source/docs/TD_RS_CONF_19_Add.1_E.pdf (accessed 18 July 2018).

2.0 SHIP REGISTRATION

It is quintessential to commence any discussion on genuine link with the concept of registration in shipping and admiralty. Registration is the process of conferring nationality on ships. Originally, it was employed as a medium so as to aid the control of ships carrying cargo in European seaborne countries[4]. It was also used to ensure that ships built in a county were crewed predominantly by nationals of the country[5]. In recent times, registration is employed to make vessels the nationals of the state where they are registered.

It is an already established principle of international law that every vessel must have a nationality.[6] The essence of this is to confer the jurisdiction of such state – whose nationality she[7] claims – on her while she navigates the high seas[8]. The vessel is entitled, amongst other things, to fly the flag of the state where she is registered.

A ship without a nationality is liable to seizure. In *Naim Molvan the owner of Motor Vessel Asya* v *Attorney-General of Palestine,*[9]the Asya, on the 29th of March, 1946 was sighted by a British Destroyer, H.M.S. Chequer, on the high seas – some 100 miles southward of Jeffa - without a flag. After being signaled by the Destroyer, a Turkish flag was hoisted. It was discovered that the vessel was unregistered and it

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[4] Maritime New Zealand, Ship Registration Act 1992 _*available online at* https://www.maritimenz.govt.nz/commercial/ships/registration/documents/A-guide-to-Ship-Registration.pdf (accessed 1 September, 2018).

[5] The National Archives, "Registration of Merchant Ships" available online at http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/registration-merchant-ships/ (accessed 10 October 2018).

[6] This is a corollary to the doctrine of freedom of the high seas.

[7] Ships are commonly referred to as "she", because the word, in Latin, was "navis," which had a feminine connotation. Consequently, feminine pronouns are used to refer to it rather than using the appropriate pronouns for non-living objects "if". See Reference, Why Is a Ship Called a She? https://www.reference.com/world-view/ship-called-she-9e902fcbf0afbb4f (accessed 10 October 2018).

[8] See Article 92 (1) of the United Nation Convention on the Laws of the Seas (UNCLOS) 1982. See also Article 6(1) of the 1958 Convention on the High Seas.

[9] (1948) AC 351; [1948] UKPC 42.

was seized. The court held that the seizure was valid. Furthermore, such vessel will be unable to engage in lawful trade[10].

Upon registration, the vessel acquires the right to fly the flag of the state and will also be given a certificate of registration by the flag state[11]. Also, certain duties are ~~also~~ imposed on the flag state[12] in relation to the vessel. Article 94 of the United Nation Convention on the Laws of *the Sea 1982*[13] (hereafter referred to as UNCLOS 1982) makes a detailed provision on the duties of flag states[14]. One of these

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[10] See section 19(4) of the Merchant Shipping Act of 2007, which provides for the detention of a ship if the master fails, on demand, to produce a certificate of registration of the ship or such other evidence to satisfy the Minister that the ship has been registered.

[11] Article 91(2) of UNCLOS; Article 5(2) of 1958 Convention on the High Seas.

[12] Flag state is the term used to refer to the state of registration of a ship.

[13] United Nations Convention on the Law of the Sea Montego Bay, 10 December 1982.

[14] The Article provides that: "1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall: (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure: (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship; (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship; (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

duties is exercising jurisdiction and control in administrative, social and technical matters over the ship. As such, it is the duty of the flag state to ensure that the ship conforms to international standards, which include inspecting the vessel regularly, certifying the ship's equipment and crew, and issuing safety and environmental protection documents[15].

Furthermore, international law gives every state the freedom to decide who their nationality will be granted to and stipulate conditions governing such grant[16]. This principle dates back to the case of *Muscat Dhows,*[17] where France and the UK submitted certain questions to the Permanent Court of Arbitration, regarding the scope of France's right to grant subjects of the Sultan of Muscat the right to fly the French flag. The basis for the contention was that the vessel was used for slave trade. There was a treaty between Muscat and France (The

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation."

[15] HG.org Legal Resources, Ship Registration Law, available online www.hg.org/ship-registration.html (accessed 12 September 2018).

[16] Article 91(1) of UNCLOS 1982. In accordance with this, various states have made laws stipulating the conditions and procedures for registering a vessel in their states. For example, In Nigeria, the Merchant Shipping Act 2007; in United Kingdom, the Merchant Shipping Act 1995; in the Kenya, Merchant Shipping Act 2009; in Australia, Merchant Shipping Act 1894 57 and 58 Vic c 60; in India, Merchant Shipping Act 1958;

[17] (1961) XI RIAA 83. Also, according to Justice Jackson in *Lauritzen v. Larsen*, 345 U.S. 571 (1953): "Every state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it"

French-Muscat Treaty 1844) which exempted French vessels from search within Muscat's territorial waters. Thus, the vessels could not be searched and so slavery which had been abolished continued within the realm. The tribunal held that every sovereign is at liberty to decide who flies its flag. Furthermore, in the *Poulsen case*[18] which concerned a Danish-owned, Panamanian-registered ship engaged in alleged illegal fishing, the Court held that the competence of a State to establish the conditions on which it would grant its nationality to a ship was absolute.

The freedom of states to determine matters of registration encouraged open registries[19]. Open registry is a term used for national flags flown by mercenary ships that have been registered in countries other than those of their owners in order to escape high domestic wages, taxation and stringent regulations on safety, manning, employment and related requirements[20]. Many ships reflagged from their traditional maritime states to flags of convenience and this consequently led to a massive loss of employment for nationals of those states and[21]violations of international obligations. Unsatisfied, labour interests sternly opposed the prevalence of flag of convenience. The concept of genuine link was introduced with a view to frustrate registration of vessels in open registries.

3.0 M/V SAIGA CASE[22]

The Saiga, provisionally registered in Saint Vincent and the Grenadines on 12 March 1997, was an oil tanker owned by Tabona Shipping Company, Cyprus. The vessel was managed by Seascot Ship managements Ltd, Scotland. As at the time of the arrest of the ship in October 1997, it was being chartered by Lemania Shipping Group, Switzerland. The vessel was used for selling gasoil as bunkers and water to fishing vessels off the coast of West Africa. The owner of the

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18 Case C-286/90 [1992] ECR I-6019.

19 Also known as flags of convenience.

20 Ademuni-Odeke, *Shipping in International Trade Relations*, (Gower Pub Co, England 1988)

21 Traditional maritime states had insisted that its vessel be crewed by nationals.

22 Also called *Saint Vincent and the Grenadines* v *Guinea*. See (1999) 38 International Legal Materials.

cargo of gas oil at the time of the arrest was Addax BV, Switzerland. The master and crew were mainly Ukrainians (three of them were Senegalese).

On 24 October 1997, the *Saiga* left Dakar fully laden with approximately 5,400 metric tons of gas oil. Three day later, she got to a point which was approximately 22 nautical miles from Guinea's island of Alcatraz where she supplied gas oil to three fishing vessels, the *Giuseppe Primo,* the *Kriti* and the *Eleni S*. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. Upon instructions from Addax BV, it sailed towards another location beyond the southern border of the exclusive economic zone of Guinea. On 28 October 1997, while awaiting the arrival of fishing vessels to which it was to supply gas oil at a point which was south of the southern limit of the exclusive economic zone of Guinea, the vessel was attacked by a Guinean patrol boat, which arrested her.

St Vincent and Grenadines brought this action claiming, in their memorial, that the arrest violates the right of Saint Vincent and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation. Guinea raised preliminary objections. One of the objections was that the *Saiga* was not validly registered in Saint Vincent at the time of its arrest and that even if it had been, there was no genuine link between the *Saiga* and Saint Vincent and therefore the claim was inadmissible.

As regards the objection on registration, the Tribunal held that by virtue of *Article 91 of UNCLOS 1982*, the granting of nationality to a ship is a matter within the exclusive jurisdiction of the State concerned. The Tribunal found as a question of fact that at the relevant time, the *Saiga* was validly registered under the law of Saint Vincent therefore had its nationality.

The Tribunal then proceeded to consider the objection on genuine link. Guinea posited that without a genuine link between Saint Vincent and the M/V Saiga, the claim is not admissible before the Tribunal. They contended that a State cannot fulfill its obligations as a flag State under the *UNCLOS 1982* unless it exercises prescriptive and

enforcement jurisdiction over the owner or, as the case may be, the operator of the ship. The suggestion would seem to be that the owners and/or operators be nationals of the flag state.

In formulating its decision, the Tribunal posited that two questions need to be addressed. The first was whether the absence of a genuine link between a flag State and a ship entitles another
State to refuse to recognize the nationality of the ship. The second question was whether or not a genuine link existed between the Saiga and Saint Vincent at the time of the incident. In deciding the first question, after an intensive survey of the Draft Articles on the *Law of the Sea 1956* to *UNCLOS 1982*, the Tribunal concluded that the concept of genuine link is not to create a condition for the registration of vessels but merely "…to secure more effective implementation of the duties of the flag State". On the second question, the court foundthat the Guinea had not adduced enough evidence to establish their claim. Therefore, the objection based on genuine link was rejected.

4.0 THE CONCEPT AND INCIDENCE OF GENUINE LINK

The concept of genuine link was first developed in relation to the nationality of individuals in *Nottebohm Case*[23]. Liechtenstein claimed restitution and compensation against Guatemala on the grounds that the latter had acted against her citizen in a manner contrary to international law. Guatemala argued that the bond of nationality between a state and an individual which should give rise to the state's right of diplomatic protection of the national was missing between Frederick Nottebohm and Liechtenstein. The facts of that case are thus: Nottebohm was born at Hamburg, Germany. In 1905, he moved to Guatemala where he lived and did business. He made the place his principal place of business and made much profit. In 1939, after the attack by Germany on Poland, he applied for naturalization in Liechtenstein. Having met all the necessary requirements laid down by the *Liechtenstein law of 1934,* he was issued a certificate of nationality on the 13 October 1939. During the war, an alliance was formed

[23] Otherwise called *Liechtenstein* v *Guatemala* [1955] I.C.J Rep. 4.

between the United States and Guatemala and the latter declared war against Germany. In the execution of their pact, Guatemala arrested persons of German ancestry and interned them in the United States. Consequently, Nottebohm was arrested, his property confiscated and seized.

In resolving the dispute, the International Court of Justice admitted that although every sovereign has the right to determine its own citizens and criteria for becoming one, the approach must be different where there is a question of diplomatic protection. The court further posited that an effective link[24] must exist between the state and the individual. Therefore, in matters of diplomatic protection, it is states which can ascertain a stronger tie with the individual that can claim jurisdiction. In the instant case, Nottebohm always retained his family and business connection with Germany. His center of business was Guatemala where he spent 34 years. There was nothing to show that his application for Liechtenstein nationality was motivated by a desire to dissociate himself from Germany. For this reasons, Liechtenstein's claim was held inadmissible.

The reasoning in *Nottebohm case* was extended to sea-going vessels. The concept was first introduced in the *1958 convention on the High Seas*[25]. The relevant provision was *in pari material* with *article 91(1) of UNCLOS 1982*[26] which provided that:

> Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. **There must exist a genuine link between the State and the ship**[27]

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[24] The court then proposed the doctrine of effective nationality. Factors to be considered would vary from case to case but should include the individual's habitual residence, center of business, family ties, public life amongst other similar considerations.

[25] See Article 5(1).

[26] Except for the absence of the clause "in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" in the latter article which was provided for in article 94(1) of UNCLOS 1982.

[27] Emphasis provided by me.

There is nowhere in the treaties where the term "genuine link" was defined. However, the meaning of the concept would, on the face of it, appear, *ex post facto,* in terms of the jurisdiction and control being exerted by the flag state over vessels registered in it[28].

To arrive at what the intention of the drafters of the treaty was by the term "genuine link", one must consult the rules of treaty interpretation. These rules are contained in the *Vienna Convention on the Law of Treaties, 1969*[29]**.** Applying the provision of *Article 31 of the Convention*[30] to *Article 91(1) of UNCLOS 1982*[31], the term – "genuine

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[28] It has been argued by Professor P.K. Fogam that if genuine link is seen in terms of jurisdiction and control, then the concept is redundant as there would be no reason to deny the existence of the link between a flag state and the ship. He further posited that "The socio-economic and political aims behind the introduction of the requirement of the connecting factor are thereby defeated"

[29] United Nations Treaty Series, Vol. 1155, p. 331. The relevant sections are articles 31 – 33.
Article 31(1) provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
Article 31(2) provides that the context for this purpose includes the text of the treaty and any agreement relating to the treaty or instruments which was made by the parties in connection with its conclusion.
Article 31(3) provides that "There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties".
Article 32 provides that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

[30] In applying the rules, *article 31* will be considered first, then *article 32*. See Robin R. Churchill. "The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships.p11

[31] It should be noted that although Article 4 of Vienna convention provides that the convention applies only to treaties which are concluded by States after its entry into force and the treaty did not enter into force until 1980, the courts have held that the Vienna rules apply to Customary International Law. See *Golder v UK*, Series A No 18 (1975), para. 29; *James v UK,* Series A No 98 (1986), para. 42, *Guinea Bissau/Senegal case,* [1991] ICJ Rep. 52 (para.

link", with reference to the context, object and purpose of the treaty, would appear to vaguely point towards the control and jurisdiction exercised by flag states. The relevant materials referred to in *Article 31(2) of the Vienna Convention* - the text of *UNCLOS 1982*[32]– appears to suggest that the observance of the obligations, provided for by the relevant Articles, is germane to the question of the existence of a genuine link.[33] Certainly, this observance is in terms of control and management by flag states. Furthermore, *Article 31(3)(b) of the Vienna Convention* provides that subsequent practice in the application of the treaty that shows the intention of the parties regarding its interpretation may be considered in interpreting the treaty. Sadly, as rightly pointed out by R. Churchill[34], no such practice was agreed to by states parties.

This position received judicial support[35] in the *Intergovernmental Maritime consultative Organization (now International Maritime Organization) case*[36]. In that case, the advisory opinion of the International Court of Justice was sought by the General Assembly of the organization to determine whether the election into the Maritime Safety Committee of the organization was in line with *Article 28(a)[37] of*

48); *the Oil Platforms (Iran/USA) case*, [1996] II ICJ Rep. 812 (para. 23); *Kasikili/Sedudu Island (Botswana/Namibia) case*, (2000) 39 International Legal Materials310, para. 18. Thus, the rules are applicable to the 1958 Geneva Convention.

[32] The relevant texts are *Article 92* which provides for the prohibition of a change of flag during a voyage or while a ship is in port, save where there is a real transfer of ownership or change of registry; *Article 94*which requires flag state to apply international standards, to their vessels, in respect of the construction, equipment, seaworthiness and manning of ships, labour conditions and the training and qualifications of crews; *Article 217*which requires flag States to enforce rules concerning pollution in respect of their ships.

[33] M. H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV (1991), pp. 255 and 257.

[34] "The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships". Robin R. Churchill. Pg. 43-44.

[35] Another support is the case under review.

[36] Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation [1960] ICJ Rep. 150.

[37] The article provides that: "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members,

the Convention of the Intergovernmental Maritime consultative Organization, 1948. At the conclusion of the election, Liberia and Panama who were the third and eight largest **by** registered tonnage were not elected. One germane question raised in the advisory opinion was the meaning of "largest ship-owning nation".

Some states, particularly the government of Norway, contended that in concluding whether a state qualifies as a ship-owning state, regard should be had to vessels owned by nationals of such state alone. Without considering the issue of genuine link, the court concluded that a state owns all the vessels registered in its registry. This opinion suggests that genuine link arises when a ship is registered in a state which controls it.

From the foregoing, it would appear that genuine link implies that there must be such connection as to enable the flag State exercise effective control over the ship and to meet its obligations under *UNCLOS 1982* and other international instruments.[38]

5.0 EX MEA SENTENTIA[39]

It is my opinion that the present position on genuine link will not remain so for long. This conclusion is reached based on the history behind the reality of the yet-to-be-ratified *1986 United Nations Convention on Condition for Registration***,** the recent activities of the Food and Agriculture Organisation and the continued agitations from labour interests.

The United Nations Conference on Trade and Development (UNCTAD) enacted the *1986 United Nations Convention on Condition*

governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas"

[38] This is *in tandem* with the opinion of United Nations Secretary-General in his report "The Oceans and the Law of the seas". See UN Document A/54/429, para. 184.

[39] This is the latin equivalent of "in my opinion"

for Registration[40]**.**The Convention which aims at "strengthening the genuine link between a state and ships flying its flag" provides that either manning or ownership, or both, of vessels registered in a state must be done by nationals of that state[41]. Once this law is ratified, it will come under "relevant rules of international law" within the scope of *Article 31(3) (c) of the Vienna Convention, 1969* therefore influencing the interpretation of *Article 91 of UNCLOS 1982* and other related provisions**.**

Additionally, the Food and Agriculture Organisation (FAO) has become involved in the issue of the genuine link. This is resulting from the activities of vessels registered under flags of convenience fishing on the high seas, an activity that has significantly contributed to the over-exploitation of fish. Although every step[42] taken by the organization towards facilitating reflagging of vessels to their traditional states have met stiff opposition, it is possible, as rightly submitted by Robin Churchill, that at "some time in the future, the FAO, either individually or jointly with the IMO, will elaborate a definition of the genuine link, at least as far as fishing vessels are concerned" (sic)[43].

It is my opinion that in no distant time, the discretionary right of a sovereign to decide who he grants his nationality to will be made

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[40] This law, it should be stated, is not operative yet because the requisite number of state for ratification is not complete. See United Nations Treaty Collection, 27 November 2013

[41] See *Articles 7, 8 and 9 of the Convention*

[42] The issue was raised at the International Conference on Responsible Fishing, held in May 1992 where a declaration calling on States "to take effective action, consistent with international law, to deter reflagging of fishing vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas," and calling onthe FAO, in particular, "to draft, in consultation with relevant international organisations, an international Code of Conduct for Responsible Fishing" was made. Similar calls were made at the United Nations Conference on Environment and Development (UNCED) in June 1992 and by the FAO Technical Consultation on High Seas Fishing in September 1992. See also the consequent Draft by the Expert Group and the recent corporation between the FAO and the IMO. See ibid 30. Pg 63 to 65.

[43] Robin R. Churchill, The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships" P. 67.

subject the presence of "genuine link" – which will be interpreted to mean economic link.

6.0 CONCLUSION

In this paper, the importance of ship registration has been pointed that. It has also been stressed that the flag state has discretion in determining who flies its flag. It has also been pointed out that the *M\V Saiga* case further emphasizes these already established international principles.

As far as the law is concerned, the concept of genuine link is not to create a condition for testing the validity of vessels' registration in flag states. However, I have canvassed that this position would, in no distant time, be changed to mean that although states still retain their discretion in granting nationality to vessels, this discretion must take into consideration the economic link between the vessels and the states which would necessarily include that either the manning or ownership, or both, of the vessel be done by nationals. The states would, however, be left to determine the extent at which these criteria would be sufficient. Consequently, any nationality which is not duly granted would not be recognized as having the rights and duties of a flag state.

Understanding the New Par Value Rules and Pricing Methodology of Nigerian Stock Exchange

Prince Ikechukwu Nwafuru*

1.0 INTRODUCTION

The Nigerian Stock Exchange ("NSE' or 'the Exchange') recently commenced the implementation of the Amended Par Value and Pricing Methodology provisions of the Rulebook of the Exchange, 2015[1] (the "Rulebook"). The relevant provisions are contained in Rules 15.29 and 15.30 of the Rulebook. Though the approval of the amendments was communicated to the Exchange by the Securities and Exchange Commission ("SEC") sometime in March 2017 and June 2015, in line with the provisions of the Investment and Securities Act, 2007 ("ISA"),[2] the Exchange did not implement the amendments immediately and had advised stakeholders and market participants to await further information on the effective date for the implementation. The effective date of 29 January 2018 was eventually communicated as the commencement date for the implementation of the Amended Rules. Given the critical role the Capital market plays in the economy, investors and the public need to understand the par value principle and related concepts and the intendment of the NSE in amending the Par Value and Pricing Methodology Rules. Equally important is the understanding of how the implementation of the Amended Rules will affect liquidity in the market particularly as it relates to low-priced stocks.

2.0 WHAT IS PAR VALUE OF A SHARE?

Simply put, par value of a share means the nominal or face value per unit of the shares held by a Company as stated in the Company's

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1 Rule Book Nigerian Stock Exchange 2015.

2 Investment and Securities Act 2007 CAP 124 Laws of the Federation of Nigeria (LFN) 2010.

Memorandum of Association and other incorporation documents. Illustration: Company X, (a publicly-traded Company) has authorized share capital of N1,000,000 divided into 2000,000 ordinary shares of 50 kobo each. 50 kobo represents the par value of each share and it is this value that is usually stated in the incorporation documents of the Company filed at the Corporate Affairs Commission. In other words, par value refers to the stated value of the shares at the time of issuance or allotment and it remains unchanged over time. However, the nominal value of a share usually changes when a company alters its share capital by way of consolidation or sub-division. Sections 100 and 101 of the Companies and Allied Matters Act,[3] provide for the procedures for alterations of share capital which include, by way of consolidation or subdivision. Thus, while consolidation of shares can lead to an increase in the par value of shares from, say 50 kobo to N1, sub-division on the other hand can lead to a decrease in the par value.

2.1 Related Concepts

The par value of a share must be differentiated from other related concepts such as offering price, opening price, market price and book value of shares. Starting with the offering price of shares, it refers to the price at which shares of a Company are offered to investors during Initial Public Offering (IPO). To appreciate how the offering price is determined one needs to understand the IPO process. In determining the offering price, the underwriters look at factors such as financial statements, company's profile, the amount of capital the company wants to raise, the level of interest from investors and previous performances of the Company in question. The underwriter usually structures the IPO, buys the shares from the company at the offering price and solicits interest from potential investors. Thus, the share price is determined by dividing the market value of the company by the number of shares outstanding. For example, a company that has 10 million outstanding shares and a market value or capitalization of N100 million will have a share price of N10. Similarly, another company that has the same market capitalization of N100 million but with outstanding shares of 20 million will thus have a share price of

[3] Companies and Allied Matters Act 1990, Cap. C20 LFN, 2004.

N5. The day the IPO is released, buy and sell orders pile up until they are balanced against each other, thereby determining the opening price.[4] The opening price in this sense represents the initial share price on the day the stocks start trading on the Exchange[5]. The forces of demand and supply determine whether the offering price is higher or lower that the opening price. The offering price could end up being the opening price of a share or share price for a given period of time but this convergence is hardly sustained due to the volatility and dynamics of capital market. The difference in the unit share price of two companies does not make one company's share superior/inferior to or more/less profitable than the other as it is only a function of quantity of outstanding shares available to investors vis-à-vis the market value. Thus, the fact that the share price of Total Nigeria Plc is N249 while that of Zenith Bank Plc is N29 does not make the former superior or more profitable to invest in. What it simply means is that Total Plc though a high priced stock has lesser outstanding shares to offer to investors. The shares of most blue chip companies are often high priced even though price is not the only determinant of a blue chip stock.[6]

Now to the market price. This refers to current price of stock on the floor of the Exchange. It can also refer to the most recent price at which the security was traded and often the result of traders, investor and dealers interacting with each other in a market.[7] The market price of a share can be accessed through the NSE's Equities Price List

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4 See Zacks' The Offering Price vs. the Opening Price of an IPO – available at https://finance.zacks.com/offering-price-vs-opening-price-ipo-2670.html (accessed 3 April 2018).

5 This should not be confused with the concept of opening and closing price of stocks for day to day trading. In this sense, opening price refers to the price at which a security first trades upon the opening of an exchange on a given trading day while closing price refers to the final price of stock at the close of trading for each day.

6 See Onome Ohwovoriole's "What you should know about blue chip stocks" available at https://nairametrics.com/what-you-should-know-about-blue-chip-stocks/ (accessed 2 April 2018).

7 See Investopedia "Market Price" available at https://www.investopedia.com/terms/m/market-price.asp (accessed 3 April 2018).

available on its website.[8] Before now, it was easier to determine the market price of securities of publicly traded companies unlike that of Over-the-Counter ("OTC") securities. However, following the global economic meltdown of 2008, the need for standardization of OTC market world over led to the establishment of FMDQ OTC Securities Exchange in Nigeria. Thus, information regarding the market price of the fixed income securities, currencies and other OTC-traded securities are now made available to the public through the FMDQ's Platform.[9] Market price is important factor in determining the market capitalization (also known as Market Cap) of a company. The market capitalization is calculated by multiplying the number of outstanding shares by the current market price of the company's share. Unlike the par value of the share which is static subject to sub-division or consolidation of the company shares, the market value of Company's shares is often changing, depending on market dynamics. The relevance of market price of a Company's shares is that it provides some insights into the performance and value of a company and it is a key indicator of bearish and bullish market respectively. Lastly, the book value of company's shares refers to balance sheet value of shares calculated as the difference between a company's total assets and its total liabilities. The book value may change due to changes in the company's net assets as reflected in its financial statements.

3.0 PRICE FLOOR/PAR VALUE RULE

Rule 15.30(c) of the Rulebook defines price floor to mean

> the amount below which the price of one unit of a share shall not be permitted to trade, and the minimum amount which must be paid for a share in the event of a drop in the unit price of that share.[10]

Prior to the implementation of the amended Par value Rule, the minimum share price for all shares listed on the Exchange was

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[8] Nigerian Stock Exchange, "Market Data" available at http://www.nse.com.ng/market-data/trading-statistics; The current market price of stocks is also displayed on NSE price ticker tapes on Channels TV.

[9] The FMDQ price ticker tape on Channels TV also displays market prices of securities traded on the Over-the-Counter platform.

[10] Supra note 1.

artificially fixed at 50 kobo per share. Thus, under the old regime, the share price of listed companies could not go below 50 kobo notwithstanding the market forces. It was believed then that fixing the floor at 50 kobo would protect listed firms from having the value of their shares fall beyond a minimum level. With the implementation of the amended par value rule, the price of share can now go below 50 kobo and even trade as low as 1 kobo. The amended Rule 15.30(a) Rulebook captures the par value rule thus:

> Notwithstanding its par value, the price of every share listed on the Exchange shall be determined by the market, save that no share shall trade below a price floor of One Kobo per unit (N0.01)[11]

In other words, with the new rule, a share may have par value of say N2, but trade as low as 10 kobo or even lower (but not below 1 kobo) on the floor of the Exchange. Explaining the basis for implementing the amended par value rule, the NSE noted as follows:

> The Exchange observed that because the minimum share price for all securities listed on the Exchange was fixed at N0.50, there was an implication that there is a relationship, although not causal, between its Par Value and Market Value. The artificial fixing of the minimum price of shares also negatively affected trading activities on low priced stocks as they were perceived to be dormant, in view of the static and unchanging status of the prices. Amongst other initiatives being undertaken by The Exchange, this Rule is being implemented to boost stock market liquidity especially for low priced stocks. Narrower bid-ask spreads will also result in lower transaction costs. In addition, it will reduce speculations and opportunity for market manipulation on low priced stocks.[12]

As expected, the amendment has indeed led to trading activities on most of the low priced stocks which hitherto were stagnant and dormant. Analysis of price list of about 180 listed companies on the

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[11] *ibid.*

[12] See the NSE's Frequently Asked Questions on the Amended Par Value Rule – available online at http://www.nse.com.ng/investors-site/becoming-an-investor/FAQs/Par%20Value%20Rule%20-%20Frequently%20Asked%20Questions.pdf (accessed 4 April 2018).

Exchange reveals that the amended Par Value Rule will affect about 46 listed companies with these low-priced stocks and most of them are currently trading between 50 to 5 kobo per share. These penny stocks cut across all the eleven 11 sectors. Insurance sub-sector alone, which has about 17 of these "kobo" stocks, seems to be the major beneficiary of the new Rule.

4.0 AMENDED SHARE PRICE GROUPING

The second amendment relates to the share pricing methodology Rule which covers the price limit, price movements, tick sizes and classification of securities into different price groups. For purposes of calculating price movements and price limits, securities traded on the floor of the Exchange were classified into groups. Prior to the amendment of Rule 15.29(d) of the Rulebook, two price groups existed in the equity market i.e. Groups A and B. Group A equities are stocks that are priced N100 or above for the period of four (4) of the last six (6) months or new security listings that are priced at N100 or above at the time of listing on the Exchange. Group A constitutes of the blue chip stocks such as Dancem, Guinness, Mobil, Seplat, Nestle and Total. Group B on the other hand, are those shares that are priced N5 or above for the period of four (4) of the last six (6) months or new security listings priced accordingly at the time of listing. Some blue chips stocks also fall into this category such as the stocks of the tier-one banks like GT Bank, First Bank Holdings, Zenith Bank, UBA, Stanbic and Access Bank. With the amendment, a new price group, Group C, was added. This last group consists of securities that are priced below N5 per share for at least four (4) of the last six (6) months or new security listings that are priced N5 per share at the time of listings on the NSE. This last group is where the penny stocks are found.

With the amendment to the Pricing Methodology Rule, the minimum pricing increments and minimum quantity traded will no longer be the one-size-fits-all of One Kobo (N0.01k) which has being used in the market for all equity securities, but now re-standardized and stratified according to the revised group classifications. On the price movement, the NSE's Interpretative Guidance Note lists the minimum quantity of

stocks required to be traded to change the published price of an equity security.[13] A trade of at least 10,000 units is required to move the price of equities trading at N100 or above (Group A) by 10 kobo. A trade of at least 50,000 units is required to move the price of equities trading at N5 or above but lower than N100 (Group B) by 5 kobo, while a trade of at least 100,000 units shall be required to move the price of equities trading 1 kobo or higher but below N5 (Group C) by 1 kobo. On the tick size, the minimum price movement that stocks in the respective groups shall trade are 10 kobo for Group A, 5 kobo for Group B and 1 kobo for Group C stocks. The tick size is a measure of the minimum upward or downward movement in the price of a security.

5.0 WHAT TO EXPECT UNDER THE NEW RULES

The implementation of the new Rules was greeted with mixed reactions from experts. However, the preponderance of views from market analysts suggests that the new Rules will bring about positive development in Nigeria's Capital Market which has enjoyed some bullish trends in recent times. Recall that Argentina and Nigeria led the pack of Best Performing Stock Markets in the World in 2017 with Nigeria coming second with the key benchmark index, NSE All share index (ASI), Year to date (YTD) standing at +40.99% towards the end of December last year. Though the Central Bank of Nigeria (CBN) has been partly credited with these positive developments, as a result of its management of the foreign exchange market which analysts believed helped notch Nigeria's stock market amongst the five top best performing Exchange for 2017, one cannot rule out the role and regulatory oversight of the market regulator (NSE) which contributed largely to this feat.[14] With Nigeria's external reserves expected to rise

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[13] See NSE, "Interpretative Guidance- Amendments to the Pricing Methodology Rule" available at http://www.nse.com.ng/regulation-site/Documents/guidance/Interpretative%20Guidance%20-%20Amendments%20to%20the%20Pricing%20Methodology%20Rule.pdf (accessed 5 April 2018).

[14] In addition to the exchange rate stability, improved economic output, other factors that led to the positive market outlook include the government policies targeted at the ease of doing business which account to increased foreign investments.

to 54 months high of $45 Billion coupled with the high crude oil prices currently hovering around USD67 per barrel, experts remain bullish on the Capital Market.[15]

On the part of the NSE, the implementation of the new pricing rule is aimed at boosting stock market liquidity especially for low priced stocks. It has also been argued that the removal of artificial floor will lead to price re-discovery and in the process weed out redundant stocks that have been unjustifiably sustained by the hitherto existing artificial structure. As widely reported, the first week of the newly adjusted per value rules saw several low-priced stocks falling below 50 kobo with some closing as low as 42 kobo and even below. As at 04 April 2018, some of the penny stocks that traded below 50 kobo on the floor of NSE include Anino International Plc at 25 kobo, Chams Plc at 48 kobo, Courteville Business Solutions Plc at 24 kobo, Equity Assurance Plc at 32 kobo, and UTC Nig. Plc which traded as low as 5 kobo. Prior to the implementation of the new Rules, analysts had feared that removing the artificial floor of 50 kobo could lead to the collapse of penny stocks and affect confidence in the market. However, that fear seems to have given way to a more realistic pricing regime that has brought some activities to hitherto redundant stocks. As it relates to insurance sector that houses most of these "kobo" stocks, the implementation of the amended Rules has seen some price movements on the stocks as investors seek to unlock their investments that have been tied up due to years of dormancy. On the downside, the new pricing rule has also revealed the challenges facing most sectors of the economy particularly the insurance sector the stocks of which have been on a free fall on the nation's bourse. Capital market investors and analysts have stressed the need for the industry regulator, and professional bodies to intensify efforts at mitigating the challenges causing the sub-optimal performance of the sector in Nigeria. The insurance stocks capitalization on the NSE dropped N6billion within a month following the implementation of the new

[15] However, market analysts now believe that Investors have also been cautious ahead of the upcoming elections in 2019 and expect private equity activity to slow down until there is certainty as to the next government's economic and fiscal policies.

pricing rule. What follows is that companies with low-priced stocks will now be expected to continue to reinvent their operations to maintain good records and boost investors' confidence in their stocks as that is the only way their continuous existence on the floor of NSE will make meaning and that will equally engender profitable trading in their respective stocks. After all, allowing one's stocks to fall as low as one kobo per share on the bourse, is as good as having a dead stock, irrespective of the liquidity it generates.

The Doctrine of Covering the Field and Lagos State Electric Power Sector Reform Law 2018: The Merits

Adesipo Adeterinwa*

ABSTRACT

The doctrine of covering the field is a constitutional law principle which is manifested specifically in a federal system of government with particular respect to which legislating house possess the constitutional power to legislate on laws in that state. Nigeria is a federal state and as such, issues arising from the doctrine are bound to manifest. The Lagos State Government recently enacted a law with respect to electricity for the state. It is worthy of note that electricity is one of the items that falls under the concurrent legislative list to which both the National Assembly and the State Houses of Assembly can validly legislate on. The law as therefore being impugned as to whether the Lagos State House of Assembly possess the power to legislate on the law. In this essay, I express my two cent from a constitutional perspective on the law and its legality.

Keywords: Covering the field, Federalism, Doctrine, Lawmakers, Electricity, Legality

1.0 INTRODUCTION

The Nigerian State operates a federal system of government,[1] consisting of 36 states and a central capital.[2] To this end, various states possess their legislative houses specifically behooved with the duty to legislate on laws for that state.[3] Basically in Nigeria, there exists the National Assembly and the State House of Assemblies, which are constitutionally empowered to make laws as provided for by the

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* All constitutional reference in this essay are with specific reference to the Constitution of the Federal Republic of Nigeria, 1999, (Third Alteration) Act, 2010, all other citation of the constitution are therefore in this regard.

[1] See generally Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010, s.2(2).

[2] *ibid.* s. 3(1) and 3(4).

[3] *Supra* note 1 at s. 4(6).

constitution[4]. There exists a bicameral legislative system at the National Assembly level which consists of the House of Representatives and the Senate which are also constitutionally empowered to make laws for the country[5].

For the purpose of clarity, the Nigerian Constitution detailed out the various items on which each legislating house possess the power to legislate on between both the National Assembly and the State house of Assembly, this is the basis of the concept of Exclusive Legislative List[6]and Concurrent Legislative List[7], while only the National Assembly has the power to legislate on items in the Exclusive Legislative List as it is provided that;

> only the National Assembly shall have the power to make laws for the peace, order and good government of the Federation or any part thereof with respect to matter included in the exclusive legislative list set out in Part I of the Second schedule of the constitution.[8]

On the other side of the legislative coin, the National Assembly and the State House of Assembly can legislate on items in the Concurrent legislative list as provided for by the constitution which provides –

> In addition and without prejudice to the powers conferred by subsection(2) of this section, the National assembly shall have power to make laws with respect to the following matters that is to say-(a) any matter in the concurrent legislative list set out in the first column of Part II of the second schedule to this constitution…[9]

It therefore simply follows that the National Assembly can constitutionally legislate on two legislative lists which are both the Exclusive and the Concurrent Legislative List, while it enjoys the power to unrestrictedly make laws as to matters in the Exclusive

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4 Section 4(1) & 4(7), *op. cit.*

5 Section 4(1), *op. cit.*

6 Part I of the Second schedule, *op. cit.*

7 First column in Part II of the Second schedule, *op. cit.*

8 Section 4(2), *op. cit.*

9 *ibid.*

Legislative list, their power to make laws on items in the concurrent legislative list is limited. Although, only the Exclusive legislative list and the concurrent legislative list are expressly provided for by the constitution, there is a jurisprudential constitutional concept of residual legislative list which is not expressly provided for by the constitution, this is basically with specific regards to issues which are not sheltered by both the exclusive and the concurrent legislative list, Residual legislative matters are the residue of legislative powers which came about after the constitution has specifically enumerated the powers of the various level of lawmaking bodies (State house of Assembly and the National Assembly) under the Exclusive and Concurrent Lists, and those items not covered by them are therefore naturally becomes product of this list. The residue thus belongs to the states, this means that only the State House of Assembly can legislate on them while where an incidental matter under a federal legislation is a residual matter, the law takes effect as a state law applicable and applies only in states and the federal capital territory.[10]

2.0 THE APPLICATION OF THE DOCTRINE IN NIGERIA: A SCOPE FROM THE CONSTITUTIONAL LENS

This doctrine of covering the field can therefore arise in two distinct situations. Firstly, where in the purported exercise of the legislative powers of the National Assembly or a State House of Assembly, a law is enacted which the Constitution has already made provision for covering the subject matter of the Federal Act or the State law, it is worthy of note that this is the only ultimate coverage, where the Constitution has therefore covered the field on a particular subject matter, the National Assembly and the State House of Assembly cannot make a valid law to that effect anymore[11]. Secondly, the doctrine manifests where a State House of Assembly by purported exercise of its legislative power enacted a law, which an act of the

[10] *Fawehinmi* v *Babangida.* (1987) 1 NWLR pt. 67,797 SC.

[11] *Attorney-General of Ogun State* v *Attorney-General of the Federation* [1982] 2 NCLR 166.

National Assembly has already made provisions covering the subject matter of the law.

Conflict therefore arising between the legislation of a state and the federal legislature on a matter in the concurrent legislative list creates room for battle for superiority of laws so passed, this was therefore a necessitating factor for the provision of the constitutional provision that states that

> If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the Law made by the National Assembly will prevail, and that other law shall to the extent of its inconsistency be void.[12]

This in clear language means that only the law validly enacted by the Federal Legislature will prevail on that also validly made by the State House of Assembly but this is only where that state law in inconsistent with that of the Federal law, but when the state legislation enacted is therefore the same with that of the National Assembly, the law made by the State house of assembly as it relates to that same matter will in abeyance and becomes inoperative for the time the statute of the National Assembly is in force.[13] It is also important to note that this principle is applicable only where the federal law entirely covers the whole field on that subject matter.

Thus, where a federal law has only covered a partial field, a situation where the effect of a federal law is to enhance a federal purpose on a concurrent subject. In that case a state can also make its own legislation to enhance its own purposes. The case of *Adetona* v *Attorney General of Ogun State*[14]was illuminating on this doctrine. In this case, the court held that where the federal law limits its application to the federal level, leaving the states free to exercise their legislative powers on the same subject on the concurrent list, the state can effectively make law on the same subject matter already legislated upon by the Federal law. This therefore simply means that legislation enacted on

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[12] Section 4(7), see also *Doherty* v *Balewa* (1961) 2 S.C.N.L.R. 25 6 at 258, *A.G Ondo* v *A.G Federation*.(1961) 2 S.C.N.L.R. 25 6 at 258.

[13] *A.G Lagos State* v *Eko Hotels*, (2017) LPELR-43713(SC).

[14] [1984] 5 NCLR 299, 308-309.

may sometimes be described as 'territorial', this is can only restricted to a particular territory, for example in such circumstance whereby the federal law has limits its application to the federal level, leaving the states free to exercise their legislative powers on that same subject. Also both the federal and state laws are taken as a 'combined' legislation, in such circumstance where both the federal and state legislations are by the terms of the federal law permitted to alternatively deal with a situation, to which end the federal law will only possess partial coverage.[15]

3.0 LAGOS STATE ELECTRIC POWER SECTOR REFORM LAW 2018: THE LEGALITIES

Based on all established backdrops, it is apparent and needs no further unnecessary justification that the Lagos State House of Assembly can validly legislate on the subject matter of electricity which is an issue present under the concurrent legislative list[16]. Although, with respect to the fact that there is an already existing Federal statute on the subject matter which is the, Electric Power Sector Reforms Act 2005, it should therefore be well noted that the area of electricity belongs to those facet of law which cannot be wholly legislated upon by the Federal law, since they are apparently territorial in nature. Therefore the National Assembly cannot wholly and completely cover the whole field as it relates to the matter. Although the provision of paragraph

[15] See the case of *A.G Ogun* v *A.G Federation.* 1982 1-2 S.C. 13. In the case, the words of Idigbe JSC illuminated on the issue when he explanatorily stated that "where under a federal set up, both the federal and the state legislatures, each being empowered by the constitution so to do legislate on the same subject then if it appears from the provision of the Federal law that it intends to cover the entire field on the subject matter and thus provide for what the law for the entire federation, then the state law on the subject is inconsistent with the federal law the latter must prevail and the state law is invalid. If no general intention to cover the entire field can be gathered from the Federal law, then the mere occurrence of the two laws (i.e. the Federal and the state laws) on this subject is not ipso an inconsistency although the detailed rules in the provision of both laws may lead to different results on the same fact"

[16] *Para.*13, 14 *op. cited*.

13, Part II of the Second Schedule[17] provides that the National Assembly may make laws for the Federation respect to electricity and the establishment of electric power stations, the provision does not therefore neglect the essential place of state legislation in their power to make laws which was provided for in paragraph 14, Part II of the Second schedule[18] which provides –

> a House of Assembly may make laws for the State with respect to Electricity and the establishment in that State of electric power stations; the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State.

The provision of the constitution is therefore apparent and fully testifies to the territorial nature of electricity when it provided for such thing as "…to areas not covered by a national grid".

The provision of this law therefore expressly provide for the exclusive power of a state legislation on the establishment within that state of any authority for the promotion and management of electric power stations established by that state, a power which the Federal law does not constitutionally possess. As already established that the issue of electricity is territorial in nature and therefore the Federal law cannot be made to cover the whole field on the subject matter. The ability of the state legislature to enact laws as it relates to electric power with respect to that state must be well respected, this therefore basically means that should the state assembly deem it necessarily fit to want to make laws governing electric power in that state they have the power to make such laws. It is therefore legally impossible as it relates to the doctrine of covering the field for the National Assembly to make laws completely covering the field as it relates to electric power to the extent that a state house of assembly can no longer make laws for a state as it relates to this subject matter. It is noteworthy that should a state want to go along the same legislative path with the Federal Law they can adopt the provision of the Electric power sector

[17] *Op. cited.*

[18] *Op. cited.*

reform Act 2005 but where they feel contrary, they are legally supported to make such laws governing their own state.

The provision of Section 4(5) of the 1999 Constitution (as amended)[19] cannot therefore also be legally applicable as to invalidate the Lagos State Electric Power Sector Reform Law, as the effect of Section is that, where the Federal and State Legislatures come up with a law each to regulate the same subject matter, precedent would be given to the Federal Legislation; only to the extent, however, that the law was validly enacted[20], therefore where both the National Assembly and the State house of Assembly enact a law with regards to the same issue in the concurrent legislative list, the law made by the National Assembly enjoys superiority or paramountcy over the law enacted by the State House of Assembly, as to the extent of where the whole field has been covered. The powers of the Federal Legislature to make laws wholly and exclusively on a subject matter is basically in respect of matters listed in the Exclusive Legislative List, With regard to the power sector, Paragraph 13 and 14 of Part II[21]have respectively made provisions that explanatorily define the extent by which laws in this list can be made between both the National and the State House of Assembly, to which end it expressly provided that a State House of Assembly validly possess the powers to make laws for a state as it relates to electricity generation, transmission and distribution not covered by a national grid within that state. In this regard, any law therefore contrary to this is therefore invalid. The constitution is also clear and express as to the irreplaceable importance of state legislation as it relates to the territory of a particular state when it stated that that "The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof"[22]. Nothing contrary to this provision of the constitution are therefore valid and should not therefore be regarded so. It is therefore apparent that any House of Assembly just like the Lagos State House of Assembly can validly make a law with regards to electricity in their

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19 *Op. cited.*

20 *A.G Abia* v *A.G Federation* (2005) 12 NWLR (Pt 940) p. 45.

21 *Op. cited.*

22 Section 4(7), *op. cited.*

state, the power of which the Constitution has validly empowered them with.

4.0 CONCLUSION

At this juncture, it is only logical to conclude that items such as electricity cannot be wholly left into the hands of the National Assembly to legislate for in a Federal state such as Nigeria, on one hand, legislating on it for the federating states will be overly cumbersome a duty for them to legislate on, and on the other hand, it will certainly delay the progress of the electricity sector of such state, such as Lagos state which is trying everything possible to achieve the goal of adequate power supply of electricity for their state. To this end, the Lagos State House of Assembly acted fully and religiously within the scope of their constitutional power as provided for in Section 4(7) and Paragraph 14, part II of the Second schedule when they enacted the Lagos State Electric Power Sector Law 2018 which not only exist to promote the peace, order and good governance of Lagos State but also to improve electricity supply to ensure economic development as it specifically relate to the State. This is therefore a welcome progressive development; it therefore should not be balked with fallacious interpretation of the constitution.

Deregistration of Political Parties and the decision of the Court in National Conscience Party v The Independent National Electoral Commission

Bolaji Jeffrey Ogalu*

1.0 INTRODUCTION

Political parties are the cornerstone of any democratic society, this is so because of the unique role they play in a democratic state. The Constitution of Nigeria give citizens the right to freely come together to form an association, a common way of realising this right is through the formation and support of political parties. The regulation of political parties is primarily vested with the Independent National Electoral Commission (INEC) and they have the power to register any political party once all statutory requirement have been fulfilled.[1] In 2010, The National Assembly in amending the Electoral Act, added another *vires* to the INEC, the section of the Electoral Act allows INEC to deregister political parties which fail to win a seat in the National Assembly or state Houses of Assembly.

While the National Assembly have constitutional duty to make law, alter and amend any law, such law must not run contrary to the constitution itself. The Court was called upon to determine the constitutionality or otherwise of such enactment. This paper would primarily review the decision of the Court of Appeal.

2.0 FACTS OF THE CASE

The National Assembly (first Respondent), in exercising its constitutionally vested legislative powers under section 4 and 228 (d) of the Constitution of the Federal Republic of Nigeria 1999 as amended[2](hereinafter referred to as "The Constitution") enacted a clause under section 78 (7) (ii) of the Electoral Act 2010 as amended

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1 see Infra, Section 222.

2 The 1999 Constitution of the Federal Republic of Nigeria, Cap 23 Laws of the Federation 2004.

(hereinafter referred to as "the Electoral Act")[3] empowering the INEC (third Respondent) to deregister political parties for failure to win a seat in the first Respondent or a State House of Assembly.

The National Conscience Party (Appellants) in examining the effect of the enactment to their political party considered the said clause *ultra vires* the legislative powers of the first Respondent and instituted the suit on 14/9/11 by Originating Summons claiming as follows:

(1) A DECLARATION that the provisions of Section 78 (7) (ii) of the Electoral Act 2010, as amended is inconsistent with Article 10 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act[4] and Section 40 of the Constitution of the Federal Republic of Nigeria 1999, as amended and is ipso facto null and void and of no legal effect having regard to the provision of Section 1(3) of the Constitution.
(2) A DECLARATION that the provisions of paragrapgh 18(1), (4), & (5) of the first schedule of the Electoral Act, contravene Section 6(6) (a) & (b) of the Constitution and are therefore null and void and of no legal effect in view of the provisions of section 1(3) of the Constitution.
(3) A PERPETUAL INJUNCTION restraining the third Defendant from further disbanding or deregistering the first plaintiff or any political party in Nigeria for that matter in breach of the provisions of the Constitution.

In the Originating Summons the Appellants sought a determination of the following questions:

(1) Whether the provisions of Section 78(7) (ii) of the Electoral Act is consistent with Article 10 of the African Charter on

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[3] Electoral Act 2010, Cap 15 Laws of the Federation, 2010. The provision provides:
(7) The Commission shall have power to de-register political parties on the following grounds- … (ii) for failure to win a seat in the National or State Assembly election.

[4] Cap 10 Laws of the Federation of Nigeria 1990.

Human and Peoples Rights (Ratification and Enforcement) Act[5] and Section 40 of the Constitution.

(2) Whether paragraph 18(1), (4), (5) of the first schedule of the Electoral Act is consistent with Section 6(6) (a) & (b) of the Constitution.

The Originating Summons was supported by a 19 paragraph affidavit. The first Respondent in opposition to the Originating Summons filed a 19-paragraph Counter Affidavit. The second Respondent did not file any response to the Originating Summons. The third Respondent on its part in opposition filed a 13-paragraph Counter Affidavit. The parties filed written addresses. The lower Court (The Federal High Court, Lagos) in its judgment delivered by Justice Abang on the 6th of March, 2013 dismissed the suit as lacking merit.

3.0 AT THE COURT OF APPEAL

Being dissatisfied with the judgment of the Federal High Court the Appellant appealed to the Court of Appeal on one original and with the leave of the court to raise fresh issues, 2 additional grounds of appeal.

In its appellant's brief, the following issues were set down for determination:-

(1) Whether the provisions of section 78(7) (ii) of the Electoral Act is consistent with the provisions of section 40 of the Constitution and Article 10 of the African Charter on Human and Peoples' Rights.
(2) Whether the provisions of section 78(7) (ii) of the Electoral Act is consistent with the provision of section 229 of the Constitution.
(3) Whether the *ejusdem generis* principle of interpretation of statutes applies to the provisions of section 228(d) of the Constitution and whether the first Respondent can exercise legislative powers vis-à-vis political parties beyond the limit of the powers conferred on it under the provisons of Section 228 of the Constitution.

[5] *ibid.*

The first Respondent in his brief identified the following two issues for determination:

(1) WHETHER the learned trial judge erred in law when he held that the provisions of section 78(7) (ii) of the Electoral Act 2010 as amended is not unconstitutional.
(2) Whether the *ejusdem generis* principle applies in the interpretation of section 228 (d) of the 1999 Constitution which empowers the first Respondent to enact section 78 (7) (ii) of the Electoral Act 2010 (as amended).

The third Respondent adopted the issues formulated by the Appellant. This appeal can be determined under the sole issue:

> Whether the provisions of section 78(7) (ii) of the Electoral Act is constitutional and consistent with the provisions of sections 40, 221-229 of the Constitution and Article 10 of the African Charter on Human and Peoples' Rights.

3.1 Argument of Both Parties

3.1.1 Appellants Arguments

The Appellants averred that the learned trial judge erred in relying heavily on the proviso to section 40 of the Constitution in holding that the provisions of section 78 (7) (ii) is not inconsistent with section 40 of the Constitution. Counsel submitted that the apex Court has held in a plethora of cases[6] that in order to discover the true meaning of a section of the Constitution, all provisions of the section must be read together and considered as a whole along with other related and associated sections of the Constitution thus the proviso to section 40 of the Constitution should not be read alone but in conjunction with the provisions of section 222 and 228 of the Constitution on restriction on formation of political parties and the powers of the first Respondent with respect to political parties, respectively. He submitted that a combined reading of the provisions of section 40 and 221-229 of the Constitution renders the provisions

[6] including *Aqua Limited* v *Ondo State Sports Council* (1998) N.W.L.R (Part 91) 622 at 625 ratio 3 and 639 D-G and *Okulate* v *Awosanya* (2000) 2 N.W.L.R (Part 646) 550 at 555 C.

of section 78 (7) (ii) of the Electoral Act, inconsistent with the Constitution, and therefore null and void, having regard to the provisions of section 1(3) of the Constitution.

On whether the provisions of section 78(7) (ii) of the Electoral Act is consistent with section 229 of the Constitution, it was submitted that the term, "Political Party" is as including any association whose activities include canvassing for votes in support of a candidate for election to the office of the President, Vice President, Governor, Deputy-Governor or membership of a legislative house or of a local government council. It was further contended that the definition contains the condition of eligibility of a registered party to continue to function as a political party and that the issue has thus been settled by the Constitution. *INEC* v *Musa & Ors* was cited.[7] The appellants submitted that by the provisions of section 78(7) (ii) of the Electoral Act, the National Assembly simply attempted a redefinition of the term, "Political Party" by making winning a seat in it, or a State House of Assembly, a condition political parties must fulfill in order to continue to function as political parties. Relying on the case of *Ehuwa* v *O.S.I.E.C*,[8] it was submitted that the *ejusdem generis* principle of interpretation of statute applies to the provisions of section 228 (d) of the Constitution, and that by virtue of same, its provisions must be interpreted within the scope and meaning of its preceding paragraphs. The appellants urged the court to note that while the provisions of section 228 (a) and (b) of the Constitution are targeted at officers of political parties that may be found wanting there under (and not the political parties themselves), the provisions of section 228 (c) is meant to assist and encourage political parties financially. Therefore, the first Respondent cannot hide under the provisions of section 228 (d) of the Constitution to enact the provisions of section 78(7) (ii) of the Electoral Act which is inconsistent with the letters and spirit of the preceding paragraphs to the said provisions of section 228(d) of the Constitution.

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7 (2003), SC (Pt. 1) at158 C – E.

8 (2006) 18 N.W.L.R. (Pt. 1012) 544 at 595 A – C.

3.1.2 First Respondent Arguments

The first Respondent's submitted that this Appeal is hypothetical and amounts to an academic exercise as there appears to be no dispute between the Appellants and the Respondents, there being nothing to show that the third Respondent or the first Respondent notified the first Appellant of its deregistration. It was further submitted that the second Respondent in this appeal is not known as 'The Attorney General of the Federal Republic of Nigeria' is not a juristic personality that can be sued. He submitted that section 150(1) of the Constitution created the office of the Attorney-General of the Federation and not 'The Attorney General of the Federal Republic of Nigeria'. He urged the court to strike out the name of the second Respondent and to dismiss the appeal on those grounds.

On whether the learned trial judge erred in law when he held that the provisions of section 78(7) (ii) of the Electoral Act (as amended) is not unconstitutional, relying on the case of *INEC v Musa & Ors*[9] **it** was submitted that Section 40 of the 1999 Constitution in its proviso recognized the power conferred on the third Respondent under the constitution to either accord recognition or deny recognition to the political parties. Learned counsel submitted that the proviso empowers the third Respondent to withdraw recognition from some already recognized political parties which do not meet up with the requirements set by the first Respondent. It was submitted that the powers of the National Assembly to set such requirements as contained in section 78(7) (ii) of the Electoral Act (as amended) is derived from the provisions of Section 228(d) and paragraph 15 (i) of Part A of the third schedule of the 1999 Constitution. It was further submitted that the requirements for the formation and/or registration of any association as a political party are as provided in section 222(a-f) of the constitution and that it is clear from the proviso to Section 40 of the Constitution and several other provisions of the constitution including section 228 (d) that the political parties must not be left unregulated.

[9] Supra note 7 at 322.

The first Respondent submitted that the appellants' counsel had in interpreting the above provision invited this Court to apply e*jusdem generis* principle of interpretation and this approach may be crucial when the statute is ambiguous and unclear. But where the wordings of the constitution are clear and unambiguous, those words should and must be given their ordinary meanings without resort to any rules of interpretation which would rather do violence to the spirit and letter of the constitution,[10] Counsel submitted that the interpretation of section 228(d) does not depend on the meaning ascribed to the different specific provisions of Section 228(a), (b) & (c) of the 1999 Constitution.

It was submitted that the court below was right in holding that the provision of section 78(7) (ii) of the Electoral Act (as amended) is constitutional.

3.1.1 Third Respondent's Arguments:

The third respondent submitted that winning elections by any political party is a pre-requisite for the continued existence of any such political party registered with the INEC as provided in section 78(7) (ii) of the Electoral Act (as amended). Learned counsel set out Section 40 of the Constitution and submitted that the lower Court was right that Section 78(7) (ii) of the Electoral Act 2010 (as amended) is consistent with section 40 of the Constitution (as amended). On whether the provisions of section 78(7) (ii) of the Electoral Act is consistent with Section 229 of the Constitution learned counsel submitted that the provision in Section 229 of the Constitution is very clear and unambiguous. Political parties must canvass for votes for their candidates to win elections.

4.0 DECISION OF THE COURT

On the disputation that the appeal is hypothetical and academic as there appears to be no dispute between the Appellants and the Respondents as neither the third Respondent nor the first Respondent notified the first Appellant that it would be deregistered. The court held the appellant has the right to challenge its constitutionally even if

[10] The 1st Respondent called in aid the case *of Awolowo* v *Shagari* (1979) NSCC 87 and *A.G. Bendel State* v *A.G. Federation & 22 Ors* (1981) 10 S.C. 1.

no step has been taken to deregister it and especially when it relates to the interpretation of the constitution. Such a case cannot be said to be hypothetical or academic.[11]

On the second objection that the second Respondent in this appeal is not known to the law as 'The Attorney General of the Federal Republic of Nigeria' is not a juristic personality that can be sued. The court held that while it is desirable that the Appellant ought to have sued "the AG of the Federation", suing the "AG of the Federal Republic of Nigeria" is not such error as should lead to the dismissal of the appeal. Section 318 of the Constitution (Part IV Interpretation) provides that "Federation" means the Federal Republic of Nigeria. The terms consequently mean the same, it cannot therefore be said that a non-juristic person was sued. No miscarriage of justice has occurred by th misnomer (if it can be called a misnomer).[12]

On whether the provisions of section 78(7) (ii) of the Electoral Act is consistent with the provisions of section 40 of the Constitution,[13] the appellant is right as has been held by the apex court in numerous cases that in order to properly construe a section of the Constitution, all the provisions of the section must be read together and considered as a whole along with other related and associated sections of the Constitution.[14]

The legislative power of the National Assembly cannot be exercised inconsistently with the provisions of the constitution. Where that happens, such law is invalid to the extent of the inconsistency. On

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[11] *Plateau State* v *A.G. Federation* (2006) 3 NWLR (Pt. 967) 346 at 419 G-H.

[12] See *Ajadi* v *Ajibola* (2004) 16 NWLR (PT. 898) 91; *Nkoku* v *U.A.C Foods* (1999) 12 NWLR (PT. 638) 557; *Bell* v *Mohammed* (2008) LPELR – 3865 (CA).

[13] Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:
Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.

[14] *Aqua Limited* v *Ondo State Sports Council* (1988) N.W.L.R. (Pt. 91) 622 at 625 and 639 D-G, *Okulate* v *Awosanya* (2000) 2 N.W.L.R (part 646) 530 at 555 C.

whether section 78(7ii) of the Electoral Act is inconsistent with section 40 of the Constitution; section 40 of the constitution allows every person the right to assemble and associate with any other person in order to interest. But the proviso to the section exempts the action of INEC in respect of political associations which are not accorded recognition. As far as recognition, non-recognition or de-registration of political parties for reasons allowed by the constitution or laws permitted under the constitution are concerned, there can be no inconsistency with section 40 of the constitution because of its proviso. But Section 78 (7ii) of the Electoral Act deals with power of INEC to de-register parties for failure to win presidential or Governorship election or a seat in the National or State Assembly election. If such power is not given directly or indirectly by any section of the constitution, then that provision of the Electoral Act is unconstitutional, null and void. In *INEC v Musa*[15] the SC held:

> The provisions of chapter iv of the constitution in which section 40 is a part are sacrosanct … since Section 40 vests in every person the right to freely associate with other persons and belong to any political party, an Act of the National Assembly… ambitiously trying to take away the rights guaranteed in the section cannot stand.

The Court further considered whether the National Assembly and INEC had the power to enact on Act and Guidelines regarding registration of political parties which are inconsistent with the provisions of the constitution. The answer it gave is of course an emphatic No! it held that the National Assembly which derives its legislative power from the constitution cannot legislate outside or beyond the constitution. It can only do what it is empowered to do by the constitution. The provision of section 228(d) is clear and unambiguous. It was not necessary to employ any rules of construction including the *ejusdem generis* rule to decipher the true meaning of the section.

Nothing in sections 221-229 of the constitution which are the sections envisaged in 228(d) make it a requirement that a political party must

[15] Supra note 7 at 231 F-H.

win a seat in the National or State Assembly in order to continue to be recognised as a political party. Further, section 229 of the constitution. It means any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or a local government council. The definition did not include winning seats but just canvassing for votes. In the last paragraph of page 13 of the lower court's judgment at page 193-194 of the Record of Appeal, the lower court held:

No doubt it is desirable as opined by the learned trial court that political parties should do more than just canvass for votes as advocated in section 229; that they should in addition win at least a seat in the legislature. But the appellant correctly stated the law that it is not one of conditions of eligibility for a registered political party to continue to function as a political party in the constitution. Again, in *INEC* v *Musa*,[16] the apex Court held:

> … where the Constitution has covered the field as to the law governing any conduct, the provision of the Constitution is the authority statement of the law on the subject … where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislative in addition to what the Constitution has enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself

Neither Section 228(d) nor indeed any other section of the Constitution can be interpreted to have given the first Respondent the power to enact Section 78(7) (ii) of the Electoral Act. Learned counsel for the first Respondent in his brief of argument quoted the following passage from *INEC* v *Musa*[17] as authority for his contention that Section 78(7) (ii) of the Electoral Act is constitutional:

> The National Assembly has power by virtue of Section 228 (d) of the Constitution, to confer by law powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that

[16] Supra note 7 at 158 C-E.
[17] *ibid* at 125.

> political parties observe the provision of sections 221-229 of the Constitution which deal with political parties, and by virtue of item 56 of the Executive Legislative List, to legislate for the regulation of political parties. INEC has direct power granted by the constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning and guideline any regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional."[18]

The quotation above did not support the contention of the first Respondent. In the above passage, it was specifically stated that the National Assembly has power on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe **the provisions of sections 221-229 of the Constitution.**[19]

The court further reiterated that there is nothing in section 221-229 of the Constitution prescribing that the continued existence of a recognised political party depended on its ability to win at the least a seat in the National or State Assembly. There is no quarrel with Section 78(7i) which empowers the Commission to de-register a political party on the ground of breach of any of the requirements for registration. But de-registration under Section 78(7ii) for failure to win at least a seat in the National or State Assembly is a different ball game. The court held there is no constitutional backing for the provision.

Clearly, the National Assembly here decreed conditions of eligibility of a registered political party to continue functioning as a political party outside the provisions of the Constitution. A right conferred by the Constitution cannot be taken away by any other statutory provision except by the Constitution itself. Section 78(7) (ii) of the Electoral Act is inconsistent with the provisions of the Constitution *INEC* v *Musa*[20]; *A.G. Abia State* v *A.G. Federation*[21] It is null and void.

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18 Emphasis supplied.
19 Emphasis Supplied.
20 Supra note 7.
21 (2002) 6 NWLR (PT. 763) 264.

The court finally held that the appeal has merit. The judgment of Abang J of the Federal High Court Lagos delivered on the 6th day of March 2013 was set aside. In its place, Reliefs 1 and 3 of the originating summons dated 14/9/11 was granted as prayed. No order as to costs was granted.

5.0 ANALYSIS

It is pertinent to state that the learned justices of the Court of Appeal got it right in dismissing the decision of the trial court. The right to freely assembly is a constitutional guaranteed right, one common way of exercising this right is through the formation of political parties where members are free to join once such person subscribe to the values, ethos and ideology of such party. The contention of the respondent that while forming a political party is a fundamental Right of any citizen but winning elections by any political party is a pre-requisite for the continued existence of any such political party registered with the INEC cannot stand in light of the definition of a political party in Section 229 which is clear that once the canvassing of votes for an election is the crux of the business of any political party that have been duly registered as such by INEC then unless there is a breach of such registration requirement, the existence of such party cannot be terminated by INEC for want of not winning a seat during an election. Furthermore, it should be noted that while the primary goal of any political is to win elections it would be myopic to conclude that this is the only function of a political party, a political party also aim to bring together different people and groups with common values and ideas; provide policy alternatives; identify and train political leaders; and serve as a link between citizens and government.

The submission that the Appeal is hypothetical and amounts to an academic exercise as there "appeared" to be no dispute between the Appellants and the Respondents, there being nothing to show that the third Respondent or the first Respondent notified the first Appellant of its deregistration. First this argument in itself stands on a sinking sand as while the courts in dismissing this argument have stated unequivocally that matters that touch on the interpretation of the constitution cannot be said to be academic as the judiciary being the guardian of our constitution have a constitutional duty to interpret.

Even though INEC had not formally deregistered the appellant, at the time the suit was commenced, the first respondents and even the court also failed to take cognizance of section 46 of the Constitution that

> (1) Any person who alleges that any of the provisions of this Chapter has been, **is being or likely to be contravened** in any State in relation to him may apply to a High Court in that State for redress. [22]

From the clear reading of Section 46, the appellant need not wait for INEC to deregister them before they approached the court for redress, as the effect of the sub clause enacted by the third respondent "was likely" to affect their continued existence as political party thus infringing on their right to freely assembly. The purport of this provision is to make litigants vigilant in safeguarding their fundamental right which the appellants to advantage of.

The political implication of the power granted to INEC is democratically suicidal, if the court of appeal had upheld the decision of the trial court, it would have meant that 80 percent of parties in Nigeria would be ultimately deregistered, gradually shifting Nigeria to a two party state, restrict the democratic space, force members of those deregistered parties to join other parties and limit the political choice of citizens. This would further limit competition between political parties as a healthy political competition make parties more responsive to voters, motivates parties to develop new ideas and strategy. It should be noted that representative democracy is impossible without multiparty competition.[23]

Economically, those deregistered parties would have to go through the vain of re-registration every four (4) years if they fail to win a sit,

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[22] Emphasis supplied.

[23] Pippa Norris, Political Parties and Democracy in Theoretical and Practical Perspectives: Developments in Party Communications, National Democratic Institute for International Affairs, available online at http://www.ndi.org/globalp/polparties/polparties.asp (accessed 29 September 2018).

expending time and resources into fulfilling the INEC requirement for registration. This would be an unintelligent waste of time and resources.

Furthermore, even the provision of the enactment is inchoate, unrealistic and anachronistic, section 78 read that a ground for deregistration is for failure to win a seat in the National or State Assembly election. This provision restricts the ground for deregistration to failure to win a seat in either the national or state parliament. The provision leaves one guessing whether a party who have a party candidate as a local government chair or a ward councilor or even at the helm of affairs of top executive elective position but not parliament could be deregistered.

6.0 CONCLUSION

It is important to commend the brave decision of the Court of Appeal in guarding the letters and spirits of our constitution and upholding the tenets of our democracy by ensuring political parties freely operate in our democratic dispensation.

An Analysis of Service of Court Processes in Nigeria: A Need for Reform

Mohammed Amusa*

ABSTRACT

It is undeniable that there is a lacuna in Nigeria's judicial system and this problem starts with service and delivery of court processes which has led to so many adjournments and thus giving credence to the maxim "Justice Delayed is Justice Denied' According to an article from the vanguard news[1] an Ilorin based lawyer Mr Temidayo Isa criticized the incessant adjournment of cases in Nigeria judicial system in his interview with the News Agency of Nigeria (NAN). Various public figures in Nigeria such Hon. Justice Dahiru Musdapher, Hon. Justice Mariam Mukhtar, Former President Goodluck Ebele Jonathan at the inauguration of Federal High Court Complex, Lokoja on 24 September,2013 have also come out to call for a quick dispensation of justice.

1.0 THE USE OF INFORMATION TECHNOLOGY IN SUBSTITUTED SERVICE OF COURT PROCESSES IN NIGERIA

In Nigeria, service of Court processes can be classified as personal and substituted service, electronic service of court process falls under Substituted Service which is usually resorted to where service cannot be made personally and leave of the court is required to effect service by substituted means.[2]

Substituted Service can be effected through

1. Delivery of the process with order of court to an agent of the defendant
2. Delivery of the process through accredited courier service
3. By advertisement in some newspaper circulating within the jurisdiction

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1 Culled from http://vanguardngr.com (accessed 29 May 2018).

2 Order 7 Rule 5 of The Lagos High Court (Civil Procedure) Rules 2012.

4. By affixing the process on a conspicuous part of the court or any other public place
5. By affixing the process together with the order on a conspicuous position at the door of the defendant last known residential or business address
6. Such other places specified by the court

Also, one of the ways to serve by Substituted means is through the Email Address of the party to be served, however this medium of Communication between the parties and the bench has not been in use despite being acknowledge as a means of serving Court processes. On 2 February 2018, the Hon. Chief Justice Walter Onnoghen in his address at the launch of the newly retrofitted Court and Legal Email System which took place at the Supreme Court stated that the new email system will replace manual form of communication between Judges, Court staff and Lawyers and this new system is to be made mandatory by 16 July 2018.[3]

It is important to note that service of court processes goes to the jurisdiction of the court, if there is lack of service it is a breach of right of fair hearing and the court may strike out the action as it lacks jurisdiction in the matter. In *Odu'a Investment Company Limited* v *Joseph Taiwo Talabi*[4] where Ogundare JSC. Held that though defect in service of a writ does not make the writ voidable, the service of such a writ would be voidable. In *Skenconsult (Nig.) Ltd.* v *Ukey*[5] it was held that service of court process in order to enable the defendant appear is condition precedent to the court assuming jurisdiction therefore where there is non-service, such proceedings no matter how well conducted may be set aside for nullity

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3 Premium Times, Mandatory Communication of Court documents by e-mail begins July 16 – CJN available at http://www.premiumtimesng.com/news/top-news/257408-mandatory-communication-court-documents-e-mail-begins-july-16-nigeria-cjn.html. (accessed 23 August, 2018).

4 (1997) 10 NWLR Pt. 523 Pg. 1 at 42.

5 (1981) 1 SC 6, 26.

The Court stated in *Alsthom S.A* v *Saraki*[6] that parties must be afforded every opportunity to present their case without let or hindrance therefore service of court process on all the parties is fundamental since Nigeria operates an adversarial system of adjudication.

The manual service of court process can however prove difficult for instance the Independent National Electoral Commission made six attempts to serve Senator Dino Melaye with notice of the petition as directed by the court.[7]

Therefore where a court process for instance a Writ of Summons is not served within Six months in Lagos, the plaintiff would have to bring a motion ex parte for renewal for another three months which would incur more expenses on the part of the plaintiff[8]

2.0 THE APPROACH IN OTHER JURISDICTIONS TO THE USE OF INFORMATION TECHNOLOGY IN SUBSTITUTED SERVICE

Other Countries have taken a step further to correct this misnomer in the judicial system, In India due to a report published by the ministry last year the average life of a case in India was pinned at 13 years, Justice Gautam Patel of the Bombay High Court made an order dated March 23, 2017, after verifying using TrueCaller that the mobile number of the defendant was the right one, the summons was then issued through WhatsApp with the blue-tick used as proof of service.[9] In Haryana India, a court of financial commissioner which was headed

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6 (2005) 3 WNLR (Pt. 911) 208.

7 Channels Tv, Melaye's Recall: We've made Six Attempts to Serve Notice INEC" available online at https://www.google.com/amp/s/www.channelstv.com/2017/10/05/melayes-recall-weve-made-six-attempts-to-serve-notice-inec/amp/ (accessed 28 August 2018).

8 Order 6 Rule 6 of the High court (Civil Procedure) Rules of Lagos State 2012.

9 Times of India, "Notice Sent via Whatsapp valid, Rules Bombay Hugh Court" available at https://www.google.com/amp/s/m.timesofindia.com/india/notice-sent-via-whatsapp-valid-rules-bombay-high-court/amp_articleshow/64608690.cms (accessed 31 May 2018).

by IAS Officer Ashok Khemka ordered after confirming that the number of the defendant Krishan Kumar was active and he was using Whatsapp that a clear image of the summons bearing the seal of the court be sent on his number. The printout of the delivery report of Whatsapp messenger authenticated by the signature of the counsel was to be taken as proof of valid service.

In a Three Judge Bench of Supreme Court of India in *Central Electricity Regulatory Commission* v *National Hydroelectric Power Corporation Ltd.*[10] where it was provided that in addition to the normal mode of service, service of notice can be effected by E-mail for which the counsel will furnish a soft copy of the entire petition/appeal in PDF format and also email addresses of the respondents company, Thus if the court issues notice then the registry will send such notice at the email addresses of the respondent company via E-mail and will also send notice at the e-mail address of the counsel for the respondent company.

In the United States of America, Service of Court process on an elusive defendant can be made by email under Rule 4(f)(3) of Federal Rule of Civil Procedure which allows U.S Courts to order service by any other means that is not prohibited by international agreement.

In the United States of America as far back as 1980, the United States Federal Courts allowed electronic service of the process in *New England Merchants National Bank* v *Iran Power Generation and Transmission*[11] where a group of American plaintiffs were unable to serve processes to Iranian defendants as a result of the diplomatic breakdown between the U.S and Iran. The District Court ordered service of the process via telex which has now become obsolete.

In 2002, the Ninth Circuit further expanded the tools of international service in *Rio Properties, Inc* v *Rio International Interlink*[12] by authorizing electronic service by email on an international defendant. In this case, two online-based casino companies operated under the same name

[10] Civil Appeal No: (D.21216/2010) 10 SCC 280
[11] CO 475 T. Supp. 73,76 (S.D.N.Y 1980)
[12] 284 F.3d 1007, 1017 (9th Cir. 2002)

"Rio". The plaintiff was unable to reach the defendant since it operated a business model where it could only be reached by email.

In *Snyder* v *Energy Inc.*[13] a New York District court allowed service through email, In this case the Defendant Corporation was not registered with the N.Y. Secretary of State and the plaintiff was unable to find a place where the defendant corporation or its president could be physically served. Plaintiffs showed the court that they made reasonable efforts to locate a current address to serve the defendants to no avail but they could reach the defendant corporation's president by his email address and they had sent an email requesting a physical address to serve the process but their emails were unanswered. The Court held that Service by email was reasonably calculated under the circumstances to notify the corporation and its president of the action and therefore is an appropriate mode of service.

Also other networking areas of social media has been resorted to as alternative methods of service of court processes for instance in *Mbafe* v *Mbafe*[14] a U.S family court in Minnesota in 2011 authorized a plaintiff to serve process through email, Facebook, or any other social networking site as technology would provide a cheaper and more efficient way.

In Australia, Rule 10. 24 of the Federal Rules of Australia 2011 governs substituted service of process in Australia and the rule provides that where it is impracticable to serve the defendant by traditional, the court may adopt any mode of substituted service that seems suitable. In *Child Support Registrar Applicant* v *Leigh*[15], the Federal Magistrate Court in Australia pursuant to Rule 10.24 ordered that the plaintiff may notify the defendant of the pendency of the proceedings against him by text message.

It is however important to note that an unrestricted use of this form of substituted service may result into an abuse of court process

[13] 857 N.Y.S.2d 442 (2008).
[14] No. 27-FA-11 (4th District Family court of Minn. May 10, 2011).
[15] 2008 WL 5543896, at para. 47.

therefore the court should take certain precautionary measures before resorting to this mode of service

In Florida's second District Court of Appeal (2nd DCA), *Coastal Capital Venture, LLC* v *Integrity Staffing Solutions, Inc.*[16] where the plaintiff obtained a default judgment after mailing a copy of the lawsuit to the Florida Secretary of State pursuant to section 48, 181(1), Florida Statutes (2012) which permits substitute service on Florida residents who conceal their whereabouts, the plaintiff had made two attempts to serve the defendants in their condominium. The Court however upheld the defendant's motion to reverse the judgment due to the fact that the Plaintiff's President and a Principal Member of the defendant had been in constant communication during which involved phone and text messages during which the latter informed him that he is currently in California therefore the Court reversed its judgment on the basis that there is failure to conduct diligent search as the plaintiff knew that the defendant is out of town yet still made several attempts to serve at his residence

In *Mayo* v *Mayo*[17], the court reversed default judgment based on invalid constructive service, serving party failed to show that he had inquired of persons likely to know the whereabouts of the opposing party.

3.0 CHALLENGES THAT MAY BE FACED IN THE USE OF INFORMATION TECHNOLOGY IN SERVICE OF COURT PROCESSES

It is important to note that while service of court processes through electronic means might be desirable for effective adjudication of cases, there might be certain obstacles to this such as acknowledgement of receipt. In Personal Service as earlier discussed, an affidavit of service must be deposed to by the bailiff or serving party stating the date, place and mode of service which would be prima facie evidence of service thus such a party who files the court process has the duty to

[16] Case No. 2D13-2915.
[17] 2d 839, 841 (Fla. 4th DCA197 9).

follow up the service of the court process, this principle was affirmed in *MT "Delmar" v. MT Ane (Ex MT Leste)*[18]

A defendant who intends to challenge the affidavit of service deposed to by the bailiff must file an affidavit denying service and detailing specific facts to show that he could not have been served on such a date, time or place.

However, where service has been made by Email or Whatsapp, with regards the latter there are situations where the read receipts of the recipients might be turned off which might make it difficult to know exact time and date of service. It might also be difficult to know when such an email was opened by the defendant or at all. This can however be resolved with the use of applications such as Mail Tracker, SalesHandy, Yesware which can notify the sender when an email has been opened or received though these might be costly and time consuming with respect to the caseload of various courts, An effective remedy to this is the employment of more IT personnel which is also a way of providing employment opportunities for unemployed graduates.

Other areas of challenges include Cyber Crime, Lack of Constant Supply of Electricity, Lack of IT awareness or Technology Know-How among most Nigerian, Cost of setting up and maintenance of these IT facilities, Nigerian Laws are not IT friendly.

These problems can be solved by encouraging foreign investors to invest in the Technology Sector of Nigeria's Economy which has been implemented by the National Office for Technology Acquisition and Promotion which provides for an avenue for foreign investors to import technology into Nigeria in return for certain incentives

The problem of lack of steady supply of electricity can be tackled by increasing the allocation budget in the power sector, Nigerian laws have also adapted to the modern trend by taking cognizance of the

[18] (2016) 13 N.W.L.R Pt. 1530 C.A 482.

admissibility of computer generated evidence[19] and also introducing IT related courses in Nigerian Universities.

4.0 RECOMMENDATION AND CONCLUSION

In summary, it can be said that the modern world has evolved from the traditional mode of service of court process to a more efficient mode of service which is actually less time consuming and cheaper. The failure or abortive attempts to serve court process on elusive defendants has led to so many adjournments and coupled with the fact most Judges are often reluctant to set such matters involving unliquidated sum of money down for hearing in the absence of the other party which might involve striking a balance between the rule of *Audi Alteram Partem* and the plaintiff's right to fair hearing under Section 36(4) of the Constitution of Federal Republic of Nigeria, 1999.

The Nigerian Courts should not restrict themselves to the manual service of electronic process but should also resort to electronic mode of service of court processes because in this Modern age, most Nigerians have an email, one social media application or the other.

[19] Section 84(2) of the Evidence Act 2011.

An Overview of The Violence Against Persons (Prohibition) Act 2015

Adetunmibi Praise*

1.0 INTRODUCTION

Many African countries do not have laws on gender- based violence. This is in part due to the predominant cultural systems of patriarchy and the consequent subordinate status of women, which filters through to low rates of reporting, a tacit tolerance of and condoning of violence against women, and the reluctance to engage legislative processes in addressing them[1]. However, that Nigerian statute books are replete with legislations combatting gender-based violence is no longer a debatable issue. Nigeria is signatory to, and has ratified several international instruments, and has not been left out in making national laws either, in adherence to, or complementary to these instruments 1or the Constitution and other national laws[2]. Notable among these, is the Violence against Persons (Prohibition) Act 2015. This article examines the provisions of the VAPP Act that is the offences, compensation and protection of victims and also the regulatory body.

1.1 Background of the Violence against Persons (Prohibition) Act 2015

Prior to the enactment of the VAPP Act, Nigeria had disparate pieces of legislation, which do not address violence against women or gender-based violence uniformly across the country[3] and is a signatory to several international treaties and conventions which recommend that state parties should enact laws to combat all kinds of violence but had

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1 Cheluchi Onyemelukwe, Legislating on Violence against Women: A Critical Analysis of Nigeria's Recent Violence against Persons (Prohibition) Act, (2016) *5 DePaul Journal of Women, Gender and the Law.*

2 Felicia Anyogu, B.N Okpalaobi, "Violence against Persons (Prohibition) Act 2015 and Other Existing Gender Legislation: A Comparative Analysis" (2017) *8 Nmandi Azikiwe University Journal of International Law and Jurisprudence.*

3 Cheluchi Onyemelukwe supra note 1 at 3.

however failed in doing so until recently when the VAPP Act was enacted at the national level.

This Act was promulgated (signed into law) on May 25th 2015. This was as a result of social and legislative advocacy by women's groups and gender activists for 14 year.[4]These women's group advocated for the repeal of discriminatory provisions in the law especially in the Penal and Criminal code and for the enactment of new law to cover acts of violence against women and children not previously covered.

Advocacy for the VAPP Act began around 1999 when the current democratic dispensation began after many years of military rule. Many women's rights and civil society groups came together to advocate for a comprehensive law, which would protect women against all kinds of violence experienced in Nigeria as a result of their female gender. The Legislative Advocacy Coalition on Violence against Women (LACVAW), an umbrella body of various women's and civil rights group, developed the Violence against Women Bill which was presented to the National Assembly in May 2002. The male-dominated body also resisted the addressing of issues relating to marital rape. However, the legislators felt that a gender-neutral approach would be more inclusive. Thus, the bill, originally submitted as the Violence against Women Bill, was changed by the legislators to read the Violence (Prohibition) Bill, 2003. As a pragmatic step, the Bill was changed to the Violence against Persons (Prohibition) Bill in 2008 receiving much more support than had hitherto been the case when it was harmonized with 8 other Bills on gender based violence in the National Assembly. It took another seven years for it to become law. The Act was finally signed into law in May 25, 2015 in the dying days of the last administration[5].

The Act has forty-seven sections, is divided into six parts, and has a schedule and provides for a range of offences, twenty-six in all, which constitute violence, as well as punishments for the violation of its provisions. The purpose of the Act is to eliminate violence in private and public life, prohibit all forms of violence against persons and to

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4 Felicia Anyogu, B.N Okpalaobi supra note 2 at 37.

5 Cheluchi Onyemelukwe supra note 1.

provide maximum protection and effective remedies for victims and punishment of offenders and for related matters[6]. Thus, the Act provides for the protection of men and women equally, and against all forms of violence which come as acts, shoves etc. that cause physical, psychological and emotional harm and whether stemming from culture or not, it takes account of violence perpetrated both in public and private domain[7].

2.0 An Overview of the Provisions of Violence against Persons (Prohibition) Act 2015

The Violence against Persons (Prohibition) Act, 2015 is a national law but its provisions are applicable only in Abuja.[8]The provisions of the Act with regards to similar offences supercedes provisions in the Criminal Code, Penal Code and Criminal Procedure Code[9].

A major significance of this Act is its broad definition of violence. The Act provides that;

> Violence in this Act, unless the context otherwise requires violence means any act or attempted act, which causes or may cause any person physical, sexual, psychological, verbal, emotional or economic harm whether this occurs in private or public life, in peace time and in conflict situation.

The definition appears all encompassing as it captures every form of imaginable nature of violence like violence against men, women, children, political violence et cetera. The VAPP Act is an Act enacted to eliminate violence in private and public life, prohibit all forms of violence against persons and to provide maximum protection and effective remedies for victims and punishment of offenders[10]. The Act

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6 Explanatory memorandum of the Violence against Persons (Prohibition) Act 2015.

7 Felicia Anyogu, B.N Okpalaobi supra note 2 at 37.

8 The Violence against Persons (Prohibition) Act 2015, section 47.

9 *ibid*, Section 45(2).

10 Taiye Joshua Omidoyin," Violence Against Persons (Prohibition) Act 2015: A Positive Step to the Eradication of Domestic Violence in Nigeria" (2018) 9 (1) *NAUJILJ*.

has forty-seven sections, is divided into six parts, and has a schedule and provides for twenty-six offences.

The Act clearly provides for various type of offences which can be categorised as follows: Sexual violence to include rape, incest; physical violence to include Female Genital Mutilation, spousal battery, deprivation of liberty; economic violence to include forced financial dependence or economic abuse, damage to property, abandonment of spouse without sustenance; psychological violence to include forced isolation, stalking, emotional abuse, verbal abuse, psychological abuse, intimidation, general violence to include coercion, offensive conduct, deprivation, indecent exposure, making false statements, frustrating investigation and political violence.[11]

2.1 Sexual Offences

The sexual offences covered by the Act includes rape, incest and indecent exposure. The Act defines rape as the intentional penetration of the vagina, anus or mouth of another person with any other part of his or her body or anything else without consent or consent is obtained by force or by means of intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking way the will of such person.[12]. The Act provides for a punitive measure of life imprisonment (various other imprisonments) for anyone found guilty of this offence under the Act[13].

The Act also provides for the offence of incest. The Act defines incest to mean an indecent act or an act which causes penetration with a person wo is to his or her knowledge, his or her daughter or son, granddaughter or son, brother, mother or father, niece or nephew, aunt/uncle, grandmother or granduncle[14]. It goes further to provide that any person who knowingly and willfully have carnal knowledge of

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[11] Cheluchi Onyemelukwe, "Overview of the Violence against Persons (prohibition) Act 2015 available at www.cheld.org.overview-of-the-violence-against-persons-prohibition-act-2015.pdf. (accessed 1 September 2018).

[12] The Violence against Persons (Prohibition) Act 2015, Section 1.

[13] *ibid*.

[14] *ibid*, Section 46.

another within the prohibited degrees of consanguinity and affinity contained in the Schedule to the Act with or without consent, commits incest and is liable on conviction to a minimum term of 10 years imprisonment without an option of fine where sex was without consent and where the two parties consent to commit incest, 5 years imprisonment without option of fine[15].

Another offence is indecent exposure. It provides that exposure of genitals with intent to cause distress, or induce to commit an act of violence; induce another to massage or touch for perpetrator's sexual enjoyment attracts the punishment of 1 year sentence or a fine of N500, 000 or both[16] .

Furthermore, the Act provides for a register for convicted sexual offenders which shall be maintained and accessible to the public[17] and where a person has more than one conviction of sexual offence, the court may declare such a person a dangerous sexual offender[18].

2.2 Physical Violence

The Act prohibit physical injury. It provides that a person who willfully causes and inflicts physical injury on another person by means of any weapon, substance or object has committed an offence and punishable with imprisonment not exceeding 5 years or a fine not exceeding N100, 000 or both, where an attempt to commit the act is made, the punishment is an imprisonment not exceeding 3 years or to a fine not exceeding N200, 000 or both. Anyone who however incites aids, abets or counsels another person to commit the act is guilty of an offence with the punishment of imprisonment not exceeding 3 years or to a fine not exceeding N200, 000 or both[19].

Also, the Act provides for the offence of spousal battery which involves the intentional and unlawful use of force or violence on a person, unlawful touching, beating or striking of another person

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15 *ibid*, Section 25.
16 *ibid*, Section 26.
17 *ibid*, Section 1 (4).
18 *ibid*, Section 43.
19 The Violence against Persons (Prohibition) Act 2015, Section 4.

against his or her will with the intention of causing bodily harming which is an offence punishable with a term not exceeding 3 years imprisonment or N200, 000 fine. Anyone who aids, abets or counsels the commission of this offence is punishable with 1 year imprisonment or N200, 000[20]. The Act further provides for the offence of attack with harmful substance in *Section 21*. This provision states that anyone who attacks with harmful substance or liquid is punishable with life imprisonment with no option of a fine. Anyone who attempts, incites, abets, aids, receives is punishable with not more than 25 years imprisonment with no option of fine. Also, anyone who engages in administering a substance with intent to stupefy or overpower a person to engage in sexual activity is guilty of an offence punishable with a term not exceeding 10 years imprisonment or fine of N500, 000.00.

Furthermore, the Act prohibits the circumcision or genital mutilation of a girl child or woman and provides that the performance or engagement of another to perform the act attracts 4 years imprisonment or fine of N200, 000 or both. Attempt, inciting, aiding, abetting, counseling to commit the act attracts N100, 000 fine or 2 years or both[21]. Also, the Act prohibits forceful eviction of a spouse or the inciting, aiding or abetting, counselling another person to commit the offence and provides for punishment in terms of imprisonment and fines[22]. The Act prohibits the deprivation of liberty except by order of court or attempt to commit the offence or abetting, counseling or assisting another person to commit the offence and provides for punishment both in terms of imprisonment and fines.[23]

2.3 Psychological Violence

The Act prohibits various forms of psychological violence which includes damage to property with intent to cause distress[24], stalking[25],

[20] *ibid*, Section 19.
[21] *ibid*, Section 6.
[22] The Violence against Persons (Prohibition) Act 2015, Section 9.
[23] *ibid*, Section 10.
[24] *ibid*, Section 11.
[25] *ibid*, Section 17.

forced isolation from family and friends[26], emotional, psychological and verbal abuse[27] and inciting, abetting or inciting another person to commit and of these offences and provides for punishment in terms of imprisonment and fines.

Furthermore, the Act prohibits harmful traditional practices and this offence is punishable by a term not exceeding 4 years imprisonment or a fine of N500, 000 or both[28]. Harmful traditional practices is defined as all traditional behaviour, attitudes or practices, which negatively affect the fundamental rights of women, girls, or any person and includes harmful widowhood practices, denial of inheritance or succession rights, female genital mutilation, forced marriage, forced isolation[29].

2.4 Political Violence

The Act pursuant to *Section 23* prohibits any violence perpetrated during political activities including thuggery, mugging, use of force to disrupt meetings, use of dangerous weapons and is punishable by a term of imprisonment not exceeding 4 years or N500, 000 fine.

Also, by *Section 24*, a state actor who commits a political offence is liable to a term of imprisonment not exceeding 4 years or 1 million naira fine or both.

2.5 Economic Violence

Section 12 prohibits forced financial dependence or economic abuse and any person who commits the offence is liable to pay a fine not exceeding 500,000 or a term of imprisonment not exceeding 2 years or both. Economic abuse is defined as forced financial dependence, denial of inheritance rights, unreasonable deprivation of financial resources for necessaries, rent etc. and unreasonable disposal of property in which the other party has an interest[30].

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[26] *ibid*, Section 13.
[27] *ibid*, Section 14.
[28] *ibid*, Section 20.
[29] *ibid*, Section 46.
[30] The Violence against Persons (Prohibition) Act 2015, Section 46.

Also, *Section 16* prohibits abandonment of spouse, children and other dependent without means of sustenance and any person who commits the offence is liable to pay a fine not exceeding 500,000 or a term of imprisonment not exceeding 3 years or both.

2.6 Other Offences

The Act in *Section 3* prohibits coercion of another to engage in any act to the detriment of that other person's physical or psychological being and any person who commits the offence is liable to term of imprisonment not exceeding 3 years. The Act however provides no definition of coercion.

Also, the Act prohibits offensive conduct that is compelling another to engage in any act detrimental to the victim's physical or psychological being and any person who commits the offence is liable to pay a fine not exceeding 500,000 or a term of imprisonment not exceeding 2 years or both and any person who incites another to commit the offence is liable to pay a fine not exceeding 300,000 or a term of imprisonment not exceeding 1 years[31].

Also, the Act any person who intimidates another commit an offence and is liable to pay a fine not exceeding 200,000 or a term of imprisonment not exceeding 1 years or both.[32]

It is important to note that the Act not only prohibits offences but also an attempt to commit an offence. The Act provides for appropriate punishment for the attempt to commit an act which is an offence under the Act[33].

2.7 Jurisdiction of the Court

The Act provides for court that has jurisdiction on matters involving the VAPP Act. *Section 27* provides that only the High Court of the Federal Capital Territory, Abuja has jurisdiction to hear and grant applications relating to the Act. This is an express provision of the Act

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31 *ibid*, Section 5.
32 *ibid*, Section 18.
33 *ibid*, Section 2(2); 5(2); 6(3); 10(2).

and no other court has jurisdiction over matter in the VAPP Act 2015 except the High Court of the F.C.T Abuja.

In a bid to promote the judicious implementation of the Act, *Section 7* of the Act make it an offence for any person to defraud or conceal an offence or frustrate the investigation and prosecution of offenders under the Act or any other enactment and *Section 8* makes any person who willfully makes a false statement whether oral or documentary in any judicial proceeding with the aim of initiating investigation or criminal proceedings under the Act against another person to be liable to and offence punishable by a fine not exceeding N200,000 or a term of imprisonment not exceeding 12 months.

2.8 Protection and Compensation of Victims

The Act guarantees some rights to be enjoyed by the complainant and these rights must often times adequately protected. These rights includes rights guaranteed under *Chapter IV* of the 1999 constitution of Nigeria, or any other international human rights instrument to which Nigeria is a party[34]. This right includes right to receive medical, psychological, social and legal assistance, right to be informed of the availability of legal, health and social services and right to rehabilitation and re-integration programme of the State[35]. In other to protect victims, the Act provides that no complainant of any offence under the Act shall be expelled, disengaged, suspended or punished in any form whatsoever by virtue of the action of compliance with the provisions of the Act[36].

The Act also provides for the protection of the identities of victims of offences under the Act. The Act provides for the number and categories of persons that may be in court during trial[37] and empowers the court to hear proceedings in camera or to exclude any person

[34] The Violence against Persons (Prohibition) Act 2015, Section 38(1).
[35] *ibid*, Section 38 (1)(a)(b)(c).
[36] *ibid*, Section 38(e).
[37] *ibid*, Section 38(3).

from attending proceedings[38] and prohibits the publication of certain information in relation to the trial[39].

Furthermore, the Act makes extensive provision for protection order. Protection order is defined by the Act as an official legal document, signed by a Judge that restrains an individual or state actors from further abusive behavior toward a victim[40].

A complaint can bring an application for protection order and where the order is granted, it is effective throughout the country[41]. Also, applications for others may be brought by police officers, accredited service provider, social worker or teacher but must however be brought with written consent of the complainant[42]. Consent is not required where the complainant is a minor, mentally retarded, or otherwise deemed unable to consent but a minor can bring an application without the assistance of the parents, with supporting affidavit from those who know the events[43]. Also, an interim protection order may be provided by the court where there is imminent danger of domestic violence[44]. Furthermore, a court may by protection order prohibit domestic violence, entering complainant's residence or place of employment, entering into a shared household or specified part, preventing complainant from entering or remaining in shared household or specified part, alienating or disposing shared household or encumbering some or committing any other act as specified under the protection order[45].

The Act also makes provisions for service providers in the areas of protecting rights, legal aid, medical care, financial or other assistance to victims of the violence but they must be registered with state

38 *ibid*, Section 38 (4).
39 *ibid*, Section 39.
40 *ibid*, Section 46.
41 The Violence against Persons (Prohibition) Act 2015, Section 28 (1).
42 *ibid*, Section 28(4).
43 *ibid*.
44 *ibid*, Section 29(2).
45 *ibid*, Section 31.

government and are granted immunity from court action when acting in good faith[46].

In addition to the above, the VAPP Act also provides for compensation of victims of violence. The Act provides that the court may award appropriate compensation to the victim as it deems fit in the circumstance[47].

2.9 Regulatory Body

Section 44 of the VAPP Act mandates the National Agency for the Prohibition of Trafficking in Persons (NAPTIP)[48] to administer the provision of the Act and collaboration with relevant stake holders, including faith based organisations. Also, by *Section 42*, the body vested with the enforcement of this Act shall appoint a coordinator for the prevention of domestic violence who shall submit to the federal government an annual report on the administration of the Act. And a copy of the report shall also be submitted to the National Bureau for statistics. It can be implied from this provision that the body vested with power to appoint a coordinator is the NAPTIP.

[46] *ibid*, Section 40.
[47] *ibid*, Section 1 (3) and 2(5).
[48] NAPTIP is the body which administers the provisions of the Trafficking in Persons (Prohibition) Administration and Enforcement Act, 2003.


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